Supreme Court, U.S.
FILED

No. (1)

04-720 NOV 24 2004

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In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE CHAPTER 13 BANKRUPTCY DISCHARGE ORDER WHICH DISCHARGED MS. DOANE'S STUDENT LOAN ENTITLED TO PRECLUSIVE EFFECT, OR ARE SUCH ORDERS VOID, WHEN THE DEBTOR DOES NOT FIRST INITIATE AN ADVERSARY PROCEEDING TO DETERMINE THE DISCHARGEABILITY OF THE STUDENT LOANS?

II. WAS THE ERRONEOUS FORM DISCHARGE ORDER ISSUED TO MS. DOANE, WHICH WAS BASED ON THE ADMINISTRATIVE OFFICE OF U.S. COURTS' FORM DISCHARGE ORDER, ENTITLED TO PRECLUSIVE EFFECT OR IS IT VOID?

PARTIES TO THIS PROCEEDING

The petitioner is Kimberly Doane (formerly known as Kimberly Harig), a citizen of Roanoke, Virginia.

The respondent is Educational Credit Management Corporation (ECMC) is a student loan guaranty agency which services federally-guaranteed student loans. ECMC is headquartered in Illinois.

CORPORATE DISCLOSURE STATEMENT

Ms. Doane is not a corporation. Ms. Doane has no parent corporation, nor does any publicly owned company own 10 percent or more of relevant stock.

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Petitioner Kimberly Doane prays that this Court will grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 28, 2004 and the order denying the petitions for rehearing entered on August 27, 2004.

OPINIONS BELOW

The June 28, 2004 opinion of the Court of Appeals, reported as *ECMC v. Doane*, 102 Fed.Appx. 312 (4th Cir. 2004), is set out at pages A-3 through A-7 of the Appendix. The August 27, 2004 order denying the petition for rehearing is at A-1 through A-2 of the Appendix. The decision of the district court is reported as *ECMC v. Harig*, 302 B.R. 177 (W.D.Va.2003) and is in the Appendix at A-8 through A-20.

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decision on June 28, 2004 (App. A-3). The petitioner Ms. Doane sought rehearing of the panel decision, and the Court of Appeals denied the motions for rehearing on August 27, 2004 (App. A-1). This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

STATUTES AT ISSUE

This case requires this Court to determine whether the respondent student loan creditor ECMC is entitled to relief, pursuant to Bankruptcy Rule 9024 (which adopts Federal Rule of Civil Procedure 60), from the bankruptcy court's order which discharged the debtor's student loan debt.

Federal Rule of Civil Procedure 60(b) states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

STATEMENT OF THE CASE

On June 14, 1996, Kimberly Doane (her name then was Kimberly Harig), an elementary school teacher and a single mother, filed a voluntary Chapter 13 case in the United States Bankruptcy Court for the Western District of Virginia.

Chapter 13 bankruptcy allows wage earners to repay their debts over a period of three to five years by proposing a plan, which must be confirmed by order of the bankruptcy court. 11 U.S.C. § 1322. Pursuant to the plan, the debtor is required to make periodic payments to a trustee, who then distributes payments to creditors. 11 U.S.C. § 1325. Once the payments under the plan are completed, the bankruptcy court issues a discharge order, releasing the debtor of her legal liability to the creditors. 11 U.S.C. § 1328. Notice of the plan, the confirmation hearing, the confirmation order, and the discharge are provided to creditors by mail. Fed. R. Bankr. Pro. 2002.

Mrs. Doane listed her student loan debt to Educational Credit Management Corporation ("ECMC") on her bankruptcy schedules. She did not provide for payment of the student loan debt as a priority debt in her plan. Her plan merely provided for payment of her

unsecured debts. The plan was confirmed, Mrs. Doane completed payments, and the bankruptcy court issued Mrs. Doane a form discharge order which stated that the student loan debt was discharged, even though it was not provided for in the plan.

The bankruptcy court issued the form discharge order which was drafted by the Bankruptcy Judge's Division of the Administrative Office of the United States Courts and distributed to bankruptcy court clerk's offices throughout the country for use, even though the discharge order erroneously contained language discharging debtors' student loans.

In 2001, Mrs. Doane reopened her bankruptcy case and filed an adversary proceeding to enjoin ECMC from collecting the discharged student loan. In response to the adversary proceeding, ECMC filed a motion for relief from the discharge order pursuant to Federal Rule of Civil Procedure 60(b)(4). The bankruptcy court denied the motion on May 23, 2002. ECMC appealed. The district court denied leave to appeal as interlocutory. ECMC then filed another motion for relief from the discharge order, in the bankruptcy case, which the bankruptcy court denied on December 20, 2002. ECMC appealed that decision. The district court reversed the bankruptcy court and "decline[d] to award the bankruptcy court's May 23, 2002 order and December 20, 2002 order preclusive effect." Mrs. Doane timely appealed the decision of the district court.

The Fourth Circuit affirmed per curiam, relying upon its earlier decision in *Banks v. Sallie Mae Servicing*

Corp., 299 F.3d 96 (4th Cir. 2002).[1] In *Banks*, the Fourth Circuit acknowledged that it was creating a split among the Circuits and held that an order of a bankruptcy court discharging a student loan debt was void unless the debtor first filed an adversary proceeding and served a summons and complaint against the student loan creditor pursuant to Federal Rule of Bankruptcy Procedure 7004. 299 F.3d at 302-303.[2] The Fourth Circuit affirmed the district court decision in Ms. Doane's case because Ms. Doane merely relied on the form discharge order and did not file an adversary proceeding to seek a discharge of the student loan. The court held that Ms. Doane's failure to file an adversary proceeding placed her case within the controlling precedent of *Banks*. (App. A-6).

Ms. Doane timely filed a petition for rehearing, but the Fourth Circuit denied the petition for rehearing on August 27, 2004. (App. A-1).

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[1] The Fourth Circuit had jurisdiction over the final decision of the district court pursuant to 28 U.S.C. § 1291.

[2] *Banks*, like most of the Chapter 13 student loan cases arising around the country since 1995, also involved the Administrative Office of the United States Courts' erroneous form discharge order, but the issue of whether the erroneous form discharge order was void for reasons separate from the failure of the debtor to serve a summons and complaint, was not addressed in *Banks*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S *BANKS* DECISION, APPLIED HERE, CONTINUES A SPLIT BETWEEN THE CIRCUITS.

The Fourth Circuit's *Banks* decision, which is the basis for the Fourth Circuit's decision in Ms. Doane's case, is in direct conflict with the decision of the Tenth Circuit in *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999) and the Ninth Circuit in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999).

These Chapter 13 student loan cases represent a controversy over "discharge by declaration" of student loans in Chapter 13.[3] Prior to 1998, student loans could be discharged in bankruptcy after a waiting period, and the debtor was not required to file an adversary proceeding, or a separate suit in bankruptcy, to determine the dischargeability of the student loan. In 1998, the Bankruptcy Code was amended to eliminate the waiting period and to require the debtor to file an adversary proceeding to determine whether his student loans are dischargeable on the basis of hardship. 11 U.S.C. § 523(a)(8). Since 1998, debtors have included language in their Chapter 13 plan which provides for discharge of their student loan debt without first filing an adversary

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[3] A discussion of this controversy is in Driscoll, *Eradicating the "Discharge by Declaration" for Student Loan Debt in Chapter 13*, 2000 U. Ill. L. Rev. 1311 (2000).

proceeding. This has been called "discharge by declaration" and there is a split of authority as to the validity of discharge by declaration.[4]

In *Banks*, the debtor filed a plan which stated that no interest would accrue on his student loan debt while he was in Chapter 13. Banks' plan provided for payment of the principal amount of the student loan. The plan was confirmed and Banks received his discharge. After Banks received his discharge, ECMC attempted to collect the debt. Banks reopened his bankruptcy and filed an adversary proceeding against ECMC to enjoin the collection of the debt. 299 F.3d at 299. The bankruptcy court entered summary judgment for Banks because the issue of whether interest on the student loan was discharged was rendered res judicata by the confirmation of the plan. *Id.* On appeal, the district court ruled that a determination of the dischargeability of the student loan must be by an adversary proceeding and confirmation does not have a preclusive effect over those issues which must be resolved in adversary proceedings, which require service of process under Fed. R. Civ. Pro. 4. *Id.*

The Fourth Circuit affirmed the district court decision, holding that the bankruptcy court erred by holding that the confirmation order made any later

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[4] Ms. Doane's case is unique because she did not seek a discharge by declaration, but received a discharge only because the court used the erroneous form discharge order. In most of the discharge by declaration cases, the debtors sought discharge by declaration, which smacks of gamesmanship, and also received the erroneous form discharge order.

collateral attack on the discharge res judicata, precluding any collateral attack on the confirmation order. The Fourth Circuit held that a debtor cannot obtain a discharge of a student loan through a confirmation order, and the debtor should have filed an adversary proceeding to determine if the interest on the student loan would be discharged, rather than relying only on the treatment of the student loan debt in the Chapter 13 plan. 299 F.3d at 303.

The Fourth Circuit acknowledged that its decision conflicted with the decision of the Tenth Circuit in *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999) and the Ninth Circuit in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999), but held that the confirmation order was void and not entitled to "preclusive effect" because "due process entitled the creditor" to be joined in an adversary proceeding to determine the dischargeability of the student loan debt. 299 F.3d at 302.[5]

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[5] The premise of the Fourth Circuit's *Banks* rule is that due process requires that a student loan creditor be joined in an adversary proceeding, and be served a summons, before a student loan may be discharged under 11 U.S.C. § 523(a)(8). This Court stated, last term, in *Tennessee Student Assistance Corp. v. Hood*, ___ U.S. ____, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), in another case involving the dischargeability of student loans in bankruptcy, that:

> The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would

In *Anderson*, the debtor presented a plan that provided for a partial payout on her student loans, with the remaining ninety percent to be discharged. The debtor did not file an adversary proceeding to determine the dischargeability of the debt. The creditor failed to object to the plan, the bankruptcy court issued a confirmation order, and then a discharge order. 179 F.3d at 1254.

After confirmation and discharge, the student loan creditor continued to attempt to collect the debt. The debtor reopened the bankruptcy case and filed an adversary proceeding to determine the dischargeability of the debt. The bankruptcy court ruled that due process required that the student loan creditor be joined in an adversary proceeding to determine whether the debtor was discharged prior to confirmation. *Anderson v. Higher Educ. Assistance Found. (In re Anderson)*, 215 B.R. 792, 794 (Bankr. 10th Cir. 1998).

On appeal, the Tenth Circuit held that due process was satisfied because the creditor received notice of the plan and the discharge by mail, as required by the Bankruptcy Rules, and had the opportunity to object to the confirmation and to the discharge. 179 F.3d at 1256. The court wrote that "a creditor cannot simply sit on its rights" and expect that its interests will be protected. *Id.* at 1257.

> raise no constitutional concern. . . . We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be of dispositive weight.

___ U.S. ___, 124 S.Ct. at 1914, 158 L.Ed.2d at 779.

The creditor claimed that the "Bankruptcy Court exceeded its authority in confirming a plan that contained provisions contrary to the Code," *id.*, but the court stated that "a confirmed plan . . . is not rendered void merely because a certain provision of the plan may be inconsistent with, or even contrary to, the Code" because of the doctrine of res judicata. *Id.* at 1247 n.8. The court wrote that '[a]lthough the provision at issue did not comply with the Code, it is now too late for [the creditor] to make the argument" that the plan should not have been confirmed because the importance of finality outweighs the adverse effects of confirming a plan with provisions offensive to the Code. *Id.* at 1259.

The Ninth Circuit followed the Tenth Circuit's *Anderson* decision in *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). In *Pardee*, the debtors proposed a plan which discharged post-petition interest on their student loan, the plan was confirmed, and the bankruptcy court issued a discharge order. 218 B.R. at 919. The student loan creditor ignored the confirmation order and discharge order, and attempted to collect the debt. The debtors reopened the bankruptcy case and filed an adversary proceeding to enforce the discharge order. *Id.* The bankruptcy court enforced the discharge order. *Id.*

On appeal, the Ninth Circuit Bankruptcy Appellate Panel wrote that "[t]he concept of the preclusive effect of final orders is a basic principle of American jurisprudence," *id.* at 923, and relied on this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), which restated, in the bankruptcy context, the principle enunciated in *Stoll v. Gottlieb*, 305 U.S. 165 (1938) that a party that does not appeal a final order is precluded from collaterally attacking

that order. *Id.* The court wrote that "[w]hile the plan should not have been confirmed with the discharge provision, the plan is res judicata as to all issues that could have or should have been litigated at the confirmation hearing," *id.* at 925, even the issue of whether the discharge order was void because the student loan was nondischargeable under the Bankruptcy Code since the debtor did not file an adversary proceeding. *Id.*

The court noted that it was "mindful that the Seventh Circuit has taken a contrary position with which we . . . disagree" in *In re Escobedo*, 28 F.3d 34 (7th Cir. 1994). In *Escobedo*, which was not a student loan case, the debtor's Chapter 13 plan did not provide for payment of taxes as required by the Bankruptcy Code. After the plan was confirmed, the debtor completed payments under the plan, and a discharge was issued. The Seventh Circuit nevertheless held that it was proper to dismiss the entire plan as void because it did not comply with the Bankruptcy Code. As a result, the plan was not res judicata as to the tax claims. *Id.* at 926.

The Ninth Circuit B.A.P. wrote that since the student loan creditor received notice of the plan and the discharge order by mail, but failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders, it implicitly accepted the confirmation and discharge and was bound by the terms of the plan. The court held that the debtor was not required to first file an adversary proceeding. *Id.* The B.A.P. decision was affirmed by the Ninth Circuit. 193 F.3d at 1083.

Thus, there is a split among the circuits: the Ninth and Tenth Circuits have held that the principle of finality

requires that discharge orders be given preclusive effect, even when the debtor does not file an adversary proceeding to determine the dischargeability of a student loan debt, while the Fourth Circuit has held that due process requires that an adversary proceeding be filed before a discharge order will be given preclusive effect.

Here, Ms. Doane did not seek a discharge by declaration, but the court issued a discharge order which granted a discharge of her student loan debt. When ECMC attempted to collect the debt, Ms. Doane reopened her case and filed an adversary proceeding to determine the dischargeability of the debt. ECMC filed a motion, under Fed. R. Civ. Pro. 60(b)(4), seeking to set aside the discharge order as void because Ms. Doane did not first file an adversary proceeding. The bankruptcy court held that the discharge order was valid because ECMC received notice of the plan and the discharge order by mail, failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders. The court held that finality required that the order be given preclusive effect. 302 B.R. at 182 (A-17). The district court reversed based on the Fourth Circuit's *Banks* decision, *id.* at 183 (A-19), and the Fourth Circuit affirmed, stating that *Banks* controlled. (A-4).

Thus, Ms. Doane's case presents a square split among the Circuits. If Ms. Doane lived in one of the fifteen states within the Ninth or Tenth Circuits, she would have won her case because ECMC failed to object to the plan, seek reconsideration of the confirmation order or discharge order, and failed to appeal the orders, even though she did not file an adversary proceeding.

This case is worthy of this Court's scrutiny because

it squarely presents an issue of federal law with significant practical consequences. A fundamental precept of bankruptcy law is that it should be uniform. U.S. Const. art. II § 8 (Congress is authorized to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). The number of Chapter 13 bankruptcy cases is significant and growing. During the period since 1998, when Congress made student loans nondischargeable, over one-half million families have filed Chapter 13, and the number of filings increases every year. *See* www.uscourts.gov/bnkrptcystats/MarchBK1986-2003.pdf. However, the treatment of those debtors is not uniform. Today, debtors who live in the Ninth and Tenth Circuits may obtain a discharge of their student loan debt without first filing an adversary proceeding, while debtors in the Fourth Circuit may not.

Now is the proper time for this Court to address whether student loans are dischargeable when the debtor fails to file an adversary proceeding and when the student loan creditor fails to object to the discharge order. The issue has now presented itself squarely and will continue to become important. Congress made student loans nondischargeable in 1998, and since most Chapter 13 plans last for several years, the issue has now percolated long enough for three Circuit courts to address the issue, but not too long for this Court to be unable to provide guidance to the lower courts still considering the issue. The issue will continue to be alive so long as there is a split in the Circuits.[6]

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[6] The issues is now being extensively litigated in the lower courts, but the lower courts recognize the split among the Circuits. *See, e.g., E.C.M.C. v. Repp*, 307 B.R.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER THE ADMINISTRATIVE OFFICE OF U.S. COURTS' ERRONEOUS FORM DISCHARGE ORDER IS ENTITLED TO PRECLUSIVE EFFECT.

This Court should grant certiorari because this case squarely presents another issue of federal law with significant practical consequences: the validity of the erroneous form discharge order issued by bankruptcy courts during the period 1994-2000.

11 U.S.C. § 1328 governs Chapter 13 discharges. When the Bankruptcy Code was enacted in 1978, there was no exception to discharge for student loans and all pre-petition student student loan debt was discharged when debtors received their Chapter 13 discharge. P.L. No. 94-498, 92 Stat. 2650 (Nov. 6, 1978).

In 1990, Congress passed the Student Loan Default Prevention Act of 1990, which provided that student loans which had not been due and payable for five years or which did not impose an undue hardship on the debtor would not be discharged. P.L. No. 101-508, 104 Stat. 1388 (eff. Nov. 5, 1990).

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944 (Bankr. 9th Cir. 2004)(acknowledging *Pardee*, but holding that *Banks* is also right in that due process requires an adversary proceeding); *Ruehle v. E.C.M.C.*,307 B.R. 28 (Bankr. 6th Cir. 2004)(following *Banks*); *E.C.M.C. v. Boyer*, 305 B.R. 42, 52 (Bankr. D.Kan. 2004)(*Banks* is correct, but *Anderson* conflicts and is binding in the Tenth Circuit).

The 1990 Act contained a sunset provision, whereby the exception to discharge created by the act would terminate on October 15, 1996. P.L. No. 101-581, 104 Stat. 2865 (Nov. 5, 1990). The sunset provision was repealed by Congress in 1992, thus making permanent the 1990 Act creating an exception to the Chapter 13 discharge for student loans. Higher Educ. Amendments of 1992, P.L. No. 102-32, 106 Stat. 448 (July 23, 1992).

The changes in the Chapter 13 discharge rules for student loans were not accurately reflected in the form Chapter 13 discharge orders used by many districts around the country. For example, the form Chapter 13 discharge order used by the Western District of Virginia, and issued to Ms. Doane, was not changed after the 1992 repeal of the sunset provision. The form order contained the following language from December 1992 through the summer of 2000:

> Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502, except any debt: . . . (c) for a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) in any case in which discharge is granted prior to October 1, 1996 . . . .

The language "in any case in which discharge is granted prior to October 1, 1996" reflects the sunset provision of the 1990 statute, which provided that the exception to discharge would terminate of October 1, 1996. When the sunset provision was repealed in 1992, the form order was not changed. Thus, the order states that student loans are not discharged prior to October 1, 1996, but the

exception to discharge is expressly limited to cases in which the discharge is issued prior to October 1, 1996. Thus, under the express terms of the order, debtors who received their discharge after October 1, 1996 received a discharge of their student loans, even though they were not entitled to a discharge under the terms of the Bankruptcy Code.

This problem arose from the distribution of Chapter 13 discharge orders by the Administrative Office of the U.S. Courts. In December 1992, over two years after the enactment of the Student Loan Default Prevention Initiative Act, the Bankruptcy Judge's Division of the Administrative Office distributed to clerks' offices around the country a discharge order which stated that student loans were excluded from discharge.[7] However, since the administration of Chapter 13 Cases usually takes several years, the order was used by clerk's offices in cases which were filed prior to November 5, 1990 when the exemption to discharge was not in effect. Thus, some debtors received Chapter 13 discharge orders which incorrectly stated that their student loan debt was not discharged when the Bankruptcy Code authorized the discharge of the student loans.

To remedy this problem, the Administrative Office distributed a revised order in March 1993, labeled "For Use Only in Cases Filed Before November 5, 1990." However, the March 1993 order did not reflect the 1992 repeal of the sunset provision which made permanent the exception of

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[7] Letter to Ms. Doane's counsel from Dick Carrelli, Office of Public Affairs, Administrative Office of U.S. Courts, October 17, 2001 (the letter is not in the record of the courts below).

student loans from discharge.

In December 1994, the Administrative Office distributed a revised Chapter 13 form discharge order which removed the phrase "in any case in which a discharge is granted prior to October 1, 1996." Some clerk's offices began to use the new order in early 1995.

Unfortunately, many clerk's offices did not implement the December 1994 revision of the order. It is apparent from the cases which have been litigated that numerous other clerk's offices around the country continued to use the December 1992 order. *See*, *e.g.*, *Pearson v. U.S. Dept of Education*, 279 B.R. 612 (Bankr. M.D. Ga. 2002); *In re McClain*, unpublished order, G95-21383-REB (Bankr. N.D. Ga. Aug. 16, 2000); *In re Tyler*, unpublished order, 98-13568-FRM (Bankr. W.D. Tex. October 10, 2002); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001).

Thus, most of the Chapter 13 debtors in the country received erroneous discharge orders in the period from November 5, 1990 until at least 1994, and in some districts, until 2000. The errors are in three categories: (1) Chapter 13 debtors who filed their cases after November 5, 1990 and who received a discharge prior to December 1992 probably received an order which stated that their student loan debt was discharged, when the Bankruptcy Code did not authorize such discharge; (2) debtors who filed their case prior to November 5, 1990, but received a discharge prior to March 1993 probably received an order which mistakenly stated that their student loans were not discharged; and (3) debtors, in some districts around the country who received discharge orders after October 1, 1996, have an order stating that their student loan debt was

discharged when the Bankruptcy Code did not authorize such a discharge.

As debtors who received the erroneous discharge orders are contacted by student loan creditors, who demand payment of the debts, debtors have begun to litigate the issue of whether the erroneous discharge orders are valid. The decisions on whether the student loans are valid are split along the same lines as the Circuit-split in the discharge by declaration cases.

Ms. Doane's case is currently the leading case on the erroneous discharge issue. The bankruptcy court held that the erroneous discharge order was valid because ECMC failed to seek reconsideration of the discharge order, and failed to appeal the discharge order, even though it was erroneous, and finality requires that the discharge order be upheld. 302 B.R. at 182 (A-17). The district court, relying solely on *Banks*, reversed because the debtor failed to file an adversary proceeding to determine the dischargeability of the student loan, regardless of whether the discharge order was erroneous, 302 B.R at 183 (A-19), and the Fourth Circuit affirmed (App. A-4).

The Tenth Circuit B.A.P. and the lower courts in the Tenth Circuit have held that the erroneous discharge orders are valid, based on *Anderson*, which conflicts with *Banks*. *See Peterson v. Student Loan Marketing Ass'n*, 1999 Bankr. LEXIS 1317, 16 Colo. Bankr. Ct. Rep. 307 (10th Cir. B.A.P. 1999); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001).

Lower courts in other circuits are split on the issue. For example, the bankruptcy court for the Middle District of Georgia held that the erroneous discharge order was

valid and held ECMC in contempt for violating the discharge order by collecting the student loan. *ECMC v. Pearson*, 2000 Bankr. LEXIS 1972 (Bankr. M.D.Ga. 2000). The district court reversed, *ECMC v. Pearson*, 2002 U.S. Dist. LEXIS 815 (M.D.Ga.2002), and the bankruptcy court was forced to vacate its prior ruling. *ECMC v. Pearson*, 279 B.R. 612 (Bankr. M.D.Ga.2002). The bankruptcy court in the Western District of Wisconsin, citing *Banks* and Ms. Doane's case, found that the orders were invalid. *In re Hanson*, 306 B.R. 241 (Bankr. W.D.Wis.2003), *aff'd*, *Hanson v. ECMC*, 308 B.R. 903 (W.D. Wis. 2004).

The erroneous form discharge issue is different from the discharge by declaration problem and the two issues can be resolved differently. This Court could find that discharge by declaration is not valid because debtors who attempt to obtain a discharge by declaration are merely attempting to circumvent the requirements of the Bankruptcy Code. At the same time, this Court could find that the erroneous form discharge orders are valid because debtors who received the orders have clean hands and received the orders due to the courts' error, not the debtors' attempt to beat the system.

This Court should take Ms. Doane's case because it is unique and squarely presents the opportunity for the Court to reach this result: Ms. Doane, unlike the debtors in the cases where the Circuits are split--*Banks*, *Anderson*, and *Pardee*--did not seek a discharge by declaration. She did not file an adversary proceeding to determine the dischargeability of her student loan, she did not attempt to obtain a discharge by declaration, and she received the erroneous form discharge order only through the court's error. Thus, Ms. Doane's case would allow the Court to

address both the issue of whether an adversary proceeding is necessary to obtain a discharge of a student loan in all circumstances, which is the precise issue on which the Circuits are split, and address the validity of the erroneous form discharge order.

This Court should grant certiorari to address whether the erroneous form discharge orders are valid for three other reasons. First, this Court has a responsibility to resolve the uncertainty which has been created by the use of the order issued by the Administrative Office of the United States Courts, which is under this Court's general purview. Second, the form discharge order affects every Chapter 13 debtor who owed a student loan and received an erroneous form discharge order in the 1990s, a group of at least several hundred thousand people. Unless this Court resolves the uncertainty over the form discharge order, the amount of litigation over this issue will continue to grow as people who received discharge orders begin to hear from their student loan creditors. Third, the form discharge order, which contains the same language throughout the country, is applied disparately: in the six states of the Fourth Circuit, the order is not valid, while it has been upheld in the nine states of the Tenth Circuit. Like the discharge by declaration issue, this is an issue of federal law with significant practical consequences, and it should be resolved to maintain uniformity of the law throughout the country.

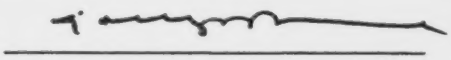
In *Beaulieu v. U.S.*, 497 U.S. 1038, 1039 (1990), Justice White wrote that this Court has a duty to maintain the law a in "satisfactory uniform condition." This case presents the Court with an opportunity to fulfill that obligation in an area which affects many Americans.

CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

KIMBERLY DOANE

By: 

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No. _____

In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: August 27, 2004

No. 03-2458
BK-96-1907-RKR-7
CA-03-84-7

In re: Kimberly Doane, a/k/a Kimberly Harig, Debtor,

Educational Credit Management Corporation,
Plaintiff-Appellee

v.

Kimberly Doane, a/k/a Kimberly Harig,
Defendant-Appellant

and

Rebecca Connelly; U. S. Trustee,
Trustees.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel consisting of Judge Widener, Judge Williams, and Judge Beezer.

FOR THE COURT

/s/ Patricia S. Connor

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In re: KIMBERLY DOANE, a/k/a Kimberly Harig,

Debtor.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Plaintiff-Appellee,

v.

KIMBERLY DOANE, a/k/a Kimberly Harig,

Defendant-Appellant,

and

REBECCA CONNELLY; U.S. TRUSTEE,

Trustees.

No. 03-2458

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, Chief District Judge.
(CA-03-84-7; BK-96-1907-RKR-7)

Submitted: May 28, 2004

Decided: June 28, 2004

Before WIDENER and WILLIAMS, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge of the
United States Court of Appeals for the Ninth Circuit,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

Gary M. Bowman, Roanoke, Virginia, for Appellant. Julie K. Swedback, St. Paul, Minnesota, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Kimberly Doane appeals a district court order issued pursuant to Federal Rule of Civil Procedure 60(b) (West 1992) relieving Educational Credit Management Corporation (ECMC) from a bankruptcy court discharge order that purported to discharge Doane's student loans. Finding no error, we affirm.

I.

On June 14, 1996, Doane filed for bankruptcy protection from her creditors. At that time, Doane owed a balance on student loans owned by ECMC. Doane did not seek to have her student loans discharged during the bankruptcy, but she did list ECMC as a creditor in her bankruptcy petition, and ECMC filed a proof of claim. Doane's bankruptcy plan did not purport to affect Doane's debt to ECMC in any way.

Doane made the payments required of her under the bankruptcy plan, and on September 10, 1999, the bankruptcy court discharged Doane's debts. For reasons that are not entirely clear, the bankruptcy court issued a discharge order that purported to discharge Doane's student loans, even though such discharge was neither sought by Doane nor authorized by the bankruptcy code.[1] *See* 11 U.S.C.A.

---

[1]The bankruptcy court appears to have used an outdated form discharge order. The form discharge order that the bankruptcy court used

§§ 523(a)(8), 1328(a)(2) (West 1993 & Supp. 2004) (prohibiting the discharge of student loans in bankruptcy unless the debtor proves in an adversary proceeding that excepting the debt from discharge would impose an undue hardship).

Sometime after the discharge order became final, ECMC attempted to collect the balance of Doane's student loans. Doane then filed an action in the bankruptcy court alleging that ECMC's collection activities violated the discharge order. The bankruptcy court agreed and enjoined ECMC from attempting to collect the debt, rejecting ECMC's contention that the discharge of Doane's debt to ECMC violated due process. ECMC appealed to the United States District Court for the Western District of Virginia. The district court relieved ECMC from the discharge order pursuant to Federal Rule of Civil Procedure 60(b), finding that the discharge of Doane's debt to ECMC violated due process because ECMC had not received adequate notice in the form of a properly initiated adversary proceeding. Doane now appeals.

II.

When a district court acts in its capacity as a bankruptcy appellate court, we review the bankruptcy court's decision independently. *See Kielisch v. Educ. Credit Mgmt. Corp. (In re Kielisch)*, 258 F.3d 315, 319 (4th Cir. 2001). We review the bankruptcy court's factual findings for clear error, and we review its legal conclusions de novo. *Id.*

---

was created at a time when the strictures applicable to the discharge of student loans were set to expire on October 1, 1996, pursuant to a sunset provision in the legislation creating the strictures. *See* Pub. L. No. 101-508 §§ 3007(b)(1), 3008. The form order provided that "the debtor [wa]s discharged from all debts . . . except any debt . . . for a student loan . . . in which discharge is granted prior to October 1, 1996." (J.A. at 5.) In 1992, Congress repealed the sunset provision, and the strictures became permanent. *See* Pub. L. No. 102-325 § 1558. When the sunset provision was repealed, a new form discharge order without a date restriction on the student loan exception was created, but the bankruptcy court here appears to have erroneously used the old order.

A party may be relieved from an adverse judgment if "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 871 (4th Cir. 1999) (internal quotation marks omitted). "[W]hether [a discharge] violate[s] a creditor's due process rights [is] [a] legal question[ ] we review de novo." *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 300 (4th Cir. 2002).

We have held that, in the bankruptcy context, "due process entitle[s] the creditor to receive notice . . . as provided by the Bankruptcy Rules." *Banks*, 299 F.3d at 302. "The Bankruptcy Code and Rules require Debtors to bring an adversary proceeding to determine the dischargeability of their student loans." *Id.* at 300; Fed. R. Bankr. P. 7001(6) (West Supp. 2004). "Student loans are nondischargeable in bankruptcy unless the Debtor can prove excepting the debt from discharge would impose an undue hardship." *Banks*, 299 F.3d at 300. When a student loan debtor "fail[s] to initiate an adversary proceeding to establish undue hardship[,] . . . [the creditor] d[oes] not receive the requisite notice of . . . intent to discharge . . . [the] student loan debts. For lack of adequate notice, . . . discharge orders discharging the [debt] are not entitled to preclusive effect." *Id.* at 302-03 (footnote omitted).

In this case, it is undisputed that Doane did not initiate an adversary proceeding to establish undue hardship. Thus, ECMC did not receive adequate notice, and the bankruptcy court's discharge order violated ECMC's due process rights. *Id.* at 303. Because the bankruptcy court's discharge order is "inconsistent with due process of law," the order is void as to ECMC, and the district court properly relieved ECMC from the order. *Eberhardt*, 167 F.3d at 871.

III.

We agree with the district court that ECMC did not receive adequate notice of intent to discharge and that the bankruptcy court order discharging Doane's student loans is therefore void. Accordingly, we

affirm the judgment of the district court relieving ECMC from the effect of the erroneous discharge order.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

FILED October 27, 2003

In re: KIMBERLY DOANE, a/k/a Kimberly Harig, Debtor,	)	Chapter 13 Case No. 7-96-01907-RKR
EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Appellant, v. KIMBERLY DOANE, Appellee.	)	Civil Action No. 7:03CV00084

MEMORANDUM OPINION
BY: SAMUEL G. WILSON, CHIEF U.S. DISTRICT JUDGE

Educational Credit Management Corporation ("ECMC") appeals the

decision and order of the United States Bankruptcy Court for the Western District of Virginia denying ECMC relief from an order discharging the student loan debt that Kimberly Doane ("Doane") owed to ECMC. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1). [**2] n1 [*179] ECMC challenges the discharge on several grounds: (1) it is void under Federal Rule of Civil Procedure 60(b)(4) because the order violated ECMC's Fifth Amendment procedural due process rights; (2) the bankruptcy court lacked subject matter jurisdiction, thereby voiding the order under Federal Rule of Civil Procedure 60(b)(4); and (3) the discharge resulted from a clerical error and relief is provided under Federal Rule of Civil Procedure 60(a). Finding that the bankruptcy court's order of discharge violated ECMC's procedural due process rights, this court reverses the decision of the bankruptcy court.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Doane objects to this appeal on the grounds that ECMC failed to properly note the appeal under Bankruptcy Rule 8001(a) or timely file its brief. First, ECMC noted its appeal on December 30, 2002, within ten days of the bankruptcy court's December 20, 2002, order, as provided by Bankruptcy Rule 8002. ECMC, at the request of the clerk, then filed an amended notice of appeal to correct an error in the caption on January 6, 2003, within the time period delineated by the clerk. HN1 However, "failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." Fed. R. Bankr. P. 8001(a). Here, ECMC timely filed its original notice and any technical deficiencies under

Bankruptcy Rule 8001(a) were not jurisdictionally fatal.

Second, Doane claims ECMC failed to timely file its brief. However, HN2 "briefs are deemed filed on the day of mailing." Fed. R. Bankr. P. 8008(a). The appeal was docketed in this court on February 4, 2003, and ECMC mailed its brief on February 19, 2003, within the required fifteen days under Bankruptcy Rule 8009. Therefore, ECMC properly appealed the decision of the bankruptcy court and timely filed its brief; Doane's motion to dismiss the appeal is, therefore, denied.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**3]

I.

On June 14, 1996, Kimberly Doane filed a voluntary petition for relief in the United States Bankruptcy Court for the Western District of Virginia under Chapter 13 of Title 11 of the United States Bankruptcy Code. As part of the petition, Doane listed an unsecured educational' loan for $ 7.819.07 owed to the Commonwealth of Virginia, which subsequently filed a proof of claim for that loan. Doane then filed a plan of reorganization. Doane, however, did not suggest in her plan that her student loan would be discharged upon confirmation. Rather, the plan called for her to pay $ 35.00 per month for thirty-six months to her unsecured creditors, which included her student loan creditor. No creditor objected, and the bankruptcy court entered a confirmation order on November 14, 1996. Doane then began making payments pursuant to the plan.

Eight months after the bankruptcy court confirmed Doane's plan, the Commonwealth of Virginia assigned Doane's student loan to ECMC on July 14, 1997. ECMC duly filed an assignment of claim with the bankruptcy court. Thereafter, upon completion of Doane's payments under the plan, the bankruptcy court entered its "Order Discharging Debtor After Completion [**4] of Chapter 13 Plan" ("discharge order"), which was mailed to ECMC at the address provided in the assignment of claim. Mistakenly, however, the bankruptcy court utilized an outdated form for the discharge order, which purported to discharge Doane's student loan debt. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Although Doane's discharge order purported to discharge her student loan debt, current Bankruptcy Code provisions, and those in effect at the time of the discharge order, require a showing of undue hardship before discharge. *See* 11 U.S.C. §§ 523(a), 1328. Prior to 1990, however, student loan debt could be discharged without a showing of undue hardship. Congress amended the code in 1990 by requiring a showing of undue hardship, but included a sunset provision that limited the new requirement to discharge orders granted prior to October 1, 1996. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990). Then, in 1992, Congress again amended the Bankruptcy Code by repealing the sunset provision. 11 U.S.C. § 1328, Historical and Statutory Notes (citing Pub. L. No. 102-325). Unfortunately, Doane's discharge order erroneously contained the outdated sunset provision, thereby purporting to discharge Doane's student loan debt.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[**5]

The discharge order, in pertinent parts, stated:
1. Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502, except any debt: ...
(c) for student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) in any case in which discharge is granted prior to October 1, 1996...

5. All creditors are prohibited from attempting to collect any debt that has been discharged in this case.

[*180] No creditor, including ECMC, appealed the discharge order within the ten days as provided by Bankruptcy Rule 8002(a).

After Doane's discharge, ECMC initiated collection procedures. Doane then reopened her bankruptcy case and filed an adversary proceeding on May 17, 2001, alleging that ECMC had attempted to collect a discharged educational loan. On August 8, 2001, ECMC answered, asserting numerous defenses and denying that the student loan debt was discharged. In the adversary proceeding, ECMC also filed a motion for relief from the bankruptcy court's discharge order pursuant to Federal Rules of Civil Procedure 60(a) **[**6]** and 60(b)(4), both made applicable by Bankruptcy Rule 9024. The bankruptcy court denied ECMC's motion on May 23, 2002. ECMC then requested leave to appeal, but this court denied the request as interlocutory.

After the court denied ECMC's request for leave to appeal, ECMC then filed another motion for relief in Doane's main bankruptcy case, rather than in the adversary proceeding, reasserting its Federal Rules of Civil Procedure 60(a) and 60(b)(4) claims and asserting that the bankruptcy court lacked subject matter jurisdiction to enter an order not in compliance with the Bankruptcy Code. By order dated December 20, 2002, the bankruptcy court denied ECMC's motion and incorporated its May 23, 2002 decision, at which point the discharge order was ripe for appeal. ECMC raises the following issues in his appeal: 1) the bankruptcy court's discharge order should be vacated as void under Federal Rule of Civil Procedure 60(b)(4) because it was entered in a manner inconsistent with due process of law; 2) the bankruptcy court's discharge [**7] order should be vacated as void under Federal Rule of Civil Procedure 60(b)(4) because the court lacked subject matter jurisdiction; and 3) the bankruptcy court erred by not vacating the discharge order under Federal Rule of Civil Procedure 60(a) because the order was entered though a clerical mistake.

II.

As noted by all the parties, Doane's discharge order purported to discharge student loan debt in a manner inconsistent with the current provisions of the Bankruptcy Code. Since the discharge order violated provisions of the Bankruptcy Code, the court must now determine whether to accord the discharge order *res judicata,* or as ECMC urges, vacate the judgment as void. This court holds the bankruptcy court's judgment void because the bankruptcy court entered

it in a manner inconsistent with the requirements of due process of law. The judgement of the bankruptcy court is, therefore, reversed.

HN3 Under Federal Rule of Civil Procedure 60(b)(4), a court may relieve a party from a final order or judgment if the judgment is void. In the interest of finality, however, [**8] the concept of a void judgment is narrowly construed and "a judgment is not void merely because it is erroneous." Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 871 (4th Cir. 1999); Baumlin & Ernst, Ltd. v. Gemini, Ltd., 637 F.2d 238, 242 (4th Cir. 1980). Despite the narrow construction, a void judgment may be subsequently challenged; "rule 60(b)(4) is not subject to any time limitation." Molinary v. Powell Mountain Coal Co., 76 F. Supp.2d 695, 699 (W.D. Va. 1999). Therefore, this court may review the order of the bankruptcy court and determine the merits of appellant's Federal Rule of Civil Procedure 60(b)(4) claim.

As interpreted by the Fourth Circuit Court of Appeals, HN4 a judgment is void under Federal Rule of Civil Procedure 60(b)(4) if "the rendering court lacked personal [*181] jurisdiction, subject matter jurisdiction, or acted in a manner inconsistent with due process of law." Eberhardt, 167 F.3d at 871 (quoting Schwartz v. United States, 976 F.2d 213, 217 (4th Cir. 1992)). In this case, ECMC argues that [**9] it did not receive the notice properly due under the Bankruptcy Rules and Code and that the bankruptcy court deprived ECMC of an opportunity to object or to have a hearing before the court discharged Doane's student loan.

A.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950), the Supreme Court stated that HN5 due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." More specifically, due process requires notice of a hearing as provided by the Bankruptcy Rules and Code. Banks v. Sallie Mae, 299 F.3d 296, 302 (4th Cir. 2002) (citing In re Linkous, 990 F.2d 160, 163 (4th Cir. 1993)). HN6 In the context of student loan debt, discharge requires a showing of undue hardship. *See* 11 U.S.C. §§ 523(a)(8), 1328. To that end, the debtor must satisfy the heightened notice requirements of an adversary proceeding by filing a complaint and by serving process upon the appropriate creditor-defendant. Banks, 299 F.3d at 300-01. [**10] *See also* Fed. R. Bankr. P. 7001(6); 4007(a); 7003.

HN7 There are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically. Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Mailing the proposed plans, the hearing notice, and the confirmation order satisfies the "notice" requirement under [Bankruptcy] Rule 2002, but not the service and summons requirement of [Bankruptcy] Rule 7004.

Banks, 299 F.3d at 301 (internal citations omitted). Moreover, HN8 in an adversary proceeding involving a corporate defendant, the plaintiff must serve "an officer, a managing or general agent, or ... any agent authorized by appointment or by law to receive service of process." Id. at 301 (citing Fed. R. Bankr. P. 7004(b)(3)). *See also* Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (indicating [**11] that where a Bankruptcy Rule "expressly requires initiation of an adversary proceeding" the creditor has the right to receive service of process in accordance with Bankruptcy Rule 7004(b)(3)). Therefore, absent specific notice of a debtor's intent to discharge a student loan debt, including the requisite service of process in an adversary proceeding, a court may not discharge student loan debt without violating due process.

B.

Despite Fourth Circuit precedent requiring a properly initiated adversary proceeding as a prerequisite for the discharge of student loan debt, Doane argues, and the bankruptcy court agreed, that ECMC received adequate due process notice. First, Doane asserts, ECMC received notice satisfying due process when it received a copy of the discharge order pursuant to Bankruptcy Rule 4004(g). Bankruptcy Rule 4004(g) simply states that HN9 "the clerk shall promptly mail a copy of the final order of discharge to [all creditors in the manner provided in Bankruptcy Rule 2002]." Fed. R. Bankr. P. 4004(g). However, as stated in Banks, HN10 notice provided under Bankruptcy Rule 2002 is inadequate [*182] when the debtor intends to discharge a [**12] nondischargeable student loan debt. In such

circumstances, the debtor must comply with the notice provisions of Bankruptcy Rule 7004. Here, Doane never served process on the proper agent under Bankruptcy Rule 7004. Rather, the clerk of the bankruptcy court merely mailed the discharge order to ECMC at the address ECMC provided in the assignment of claim, pursuant to Bankruptcy Rule 2002. n3 Since Doane failed to specifically notify ECMC of her intent to discharge her student loan debt, as required by the Bankruptcy Rules and Code, the subsequent discharge order denied due process to ECMC.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 HN11 Under Bankruptcy Rule 2002, the clerk of the bankruptcy court mails each creditor notice to an address the creditor specifically requests or to the address shown on the list of creditors.

- - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - -

Second, Doane argues that ECMC in effect waived its due process rights by receiving a copy of the discharge order and, thereafter, failing to take any action to attack that order. In Banks, however, the Fourth Circuit found a violation [**13] of due process where the creditor received notice of the purported discharge of student loan interest before the confirmation hearing, providing more opportunity to object than in the present case. Banks, 299 F.3d at 299. As in Banks, the debtor in the present case never satisfied the notice requirements of Bankruptcy Rule 7004. Furthermore, in this case, ECMC failed to receive any notice of the purported discharge until after the discharge order, when its rights were effectively decided. Although ECMC could have appealed the discharge order within ten days of entry, the

lack of appropriate notice under the Bankruptcy Rules and Code provided no meaningful notice or opportunity to be heard prior to entry of the order. In fact, ECMC could have challenged entry of the discharge order only if it was able to anticipate the error before the bankruptcy court even entered it. Such a deficiency falls short of the notice standard applied in Banks, and violates due process.

C.

Finally, both the bankruptcy court and Doane rely extensively on Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997), as preventing a collateral attack **[**14]** on a final order of the bankruptcy court. That reliance is misplaced. In Spartan Mills, the Fourth Circuit considered a case involving disputed first lien priority status between two creditors. In that case, the Bankruptcy Court for the Southern District of Florida entered a provisional order establishing first lien status for Bank of America and requiring conflicting creditors to timely object. Id. at 1253. Although Spartan Mills, which acted as a representative of the unsecured creditors committee, received notice of the provisional order, no creditor, including Spartan Mills, objected. The bankruptcy court then entered an order directing sale of the debtor's assets. Id. at 1253. Like the provisional order, Spartan Mills received actual notice of the order directing sale, but failed to object. Id. at 1253. n4 One month after the order directing sale, **[*183]** the court approved the sale of assets and granted Bank of America first priority in the proceeds. Id. at 1254. Then, a year-and-a-half after the sale, Spartan Mills filed an action in the District Court of South Carolina objecting to the bankruptcy court's

ruling. On [**15] appeal, the Fourth Circuit rejected Spartan Mills' collateral attack on the bankruptcy court's order and held that Spartan Mills did not lack due process knowledge. Id. at 1255, 1258 (noting that "this is not the case where [the creditor] was caught by surprise because of a lack of due process notice").

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 After the court's order directing sale, Spartan Mills filed an adversary proceeding in the bankruptcy court, asserting its priority in the lien and challenging the bankruptcy court's rulings. Id. at 1254. Spartan Mills, however, failed to take any action to prosecute the adversary proceeding and voluntarily dismissed it. Id. at 1255. Although under Bankruptcy Rules, adversary proceedings should be filed by the debtor and notice should be provided as directed by the Bankruptcy Rules and Code, Spartan Mills' action "belied any claimed lack of knowledge." Id. at 1257.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Unlike Spartan Mills, ECMC did not have the notice required by due process. [**16] Spartan Mills, a party to the bankruptcy proceeding in Florida, received actual notice of the lien priority orders issued by the bankruptcy court before the orders became final. As noted by the court, "it ... cannot be disputed that Spartan Mills was a party to the bankruptcy proceedings in Florida. It was a creditor; it received notice of all proceedings; it served as representative of the creditors' committee; and it filed its own adversary proceeding ..." Id. at 1256. In this case, however, ECMC never participated in any of the bankruptcy proceedings. It was never a party to the action; it never served on a creditor's committee; and it never received specific notice, such as

service of process, of any of the proceedings. Moreover, it had no opportunity to object to the discharge order because the order was already final at the time ECMC received it. Therefore, unlike Spartan Mills, ECMC failed to receive the proper protections provided by due process.

III.

In sum, following the decision of the Fourth Circuit in Banks, this court finds the Bankruptcy Rules and Code required Doane to provide proper notice of an adversary proceeding before the bankruptcy court [**17] discharged her student loan debt. By failing to give specific notice, the discharge violated ECMC's due process rights and the order of bankruptcy court is void. Having decided this case on due process grounds, this court finds it unnecessary to examine the other claims of ECMC.

Accordingly, this court declines to award the bankruptcy court's May 23, 2002, order and December 20, 2002, order preclusive effect. The decision of the bankruptcy court is reversed. The court finds that ECMC's claim against Doane survived the bankruptcy court's Order of Discharge.

ENTER this October 27, 2003.

ORDER

(2)

Supreme Court, U.S.
FILED
DEC 30 2004
OFFICE OF THE CLERK

No. 04-728

IN THE

Supreme Court of the United States

KIMBERLY DOANE,
A/K/A KIMBERLY HARIG, PETITIONER

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JULIE K. SWEDBACK
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RESPONDENT'S RULE 29.6 DISCLOSURE STATEMENT

Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation organized under the laws of the State of Minnesota and headquartered in St. Paul, Minnesota. Its parent corporation is ECMC Group, Inc., a private nonprofit corporation organized under the laws of the State of Delaware. No publicly held company owns more than 10% of ECMC or ECMC Group's stock.

PARTIES TO THIS PROCEEDING

Kimberly Doane, as stated in Petitioner's statement.

Respondent ECMC is a student loan guaranty agency in the Federal Family Education Loan Program (FFELP) and is governed by the Higher Education Act, 20 U.S.C. § 1070 *et seq.* and 34 C.F.R. § 682.100 *et seq.* In addition, ECMC provides specialized guarantor services to the United States Department of Education (ED) and other FFELP guaranty agencies, including accepting the transfer of title to certain student loan accounts on which the borrower has filed bankruptcy. ECMC is headquartered in Minnesota.

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RELEVANT AUTHORITY INVOLVED

In addition to the authority referenced by Petitioner, this matter also involves the following constitutional provisions, statutes, and rules:

A. U.S. Const. amend. V:

> No person shall be . . . be deprived of life, liberty, or property, without due process of law; . . . .

B. 11 U.S.C. § 1328(a)(2):

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –
>
> . . . .
>
> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title.

C. 11 U.S.C. § 523(a)(8):

> (a) A discharge under section . . . 1328(a) of this title does not discharge an individual debtor from any debt–

. . . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. Thus, pursuant to these provisions, the Bankruptcy Code expressly excepted student loan debt from § 1328(a)'s general discharge provisions and required a showing of undue hardship before a debtor could obtain a discharge of student loan debt.

D. Fed. R. Bankr. P. 7001(6):

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

. . . .

(6) a proceeding to determine the dischargeability of a debt;

E. Fed. R. Bankr. P. 7003:

Rule 3 F.R.Civ.P. applies in adversary proceedings.

F. Fed. R. Bankr. P. 7004(b)(3):

. . . .

(b) Service by first class mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

INTRODUCTION

This is a case about due process of law. It is not about whether the Petitioner's "clean hands" justify the serendipitous discharge of her student loan debt or whether the responsibility for the erroneous form discharge orders lies with the Administrative Office of U.S Courts or the federal bankruptcy courts. Rather, in granting ECMC's motion for relief under Fed. R. Civ. P. 60 (b)(4), the courts below ratified the fundamental precept that all parties, even student loan creditors, are entitled to notice *and* an opportunity for a hearing before their substantive rights can be affected. Contrary to Petitioner's Brief, there is no split of authority within the federal circuit courts on this issue. And, while due process concerns always raise important federal questions, neither the facts nor the law of this case presents any compelling basis for invoking this Court's review.

COUNTER-STATEMENT OF THE CASE AND FACTS

On June 14, 1996, Petitioner Kimberly Harig Doane (Doane) filed a Voluntary Petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Virginia, Roanoke Division.[1] On her Chapter 13 schedules, Doane listed her unsecured student loan

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[1] This Statement of Facts is largely drawn from the district court's Order, dated October 27, 2003, found in the Petitioner's Appendix (Pet. App.), at A-8.

debt. The original holder of her student loan debt ultimately assigned it to Educational Credit Management Corporation (ECMC) on or about July 14, 1997.[2]

Along with her petition, Doane submitted a 36-month plan, proposing to pay $35.00 a month to her unsecured creditors, which included her student loan debt. Doane's plan was confirmed without objection on November 14, 1996. Significantly, Doane did not suggest in her plan that her student loan debt would be discharged upon confirmation, nor did she ever file an adversary proceeding in her Chapter 13 bankruptcy proceeding to discharge her student loan debt pursuant to 11 U.S.C. § 523(a)(8).

Doane completed her payments under the plan, and the bankruptcy court entered its Order Discharging Debtor After Completion of Chapter 13 Plan, pursuant to 11 U.S.C. § 1328, on September 10, 1999.

11 U.S.C. § 1328 defines the discharge granted to debtors who complete a Chapter 13 plan. The law in effect on the date that Doane was granted a discharge read in pertinent part:

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[2] ECMC is a student loan guaranty agency in the Federal Family Education Loan Program (FFELP) and is governed by the Higher Education Act, 20 U.S.C. § 1070 *et seq.* and 34 C.F.R. § 682.100 *et seq.* In addition, ECMC provides specialized guarantor services to the United States Department of Education (ED) and other FFELP guaranty agencies, including accepting the transfer of title to certain student loan accounts on which the borrower has filed bankruptcy.

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –
>
> . . . .
>
> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title.

Section 523(a)(8), referenced in § 1328(a), provided:

> (a) A discharge under section . . . 1328(a) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. Thus, pursuant to these

> provisions, the Bankruptcy Code expressly excepted student loan debt from § 1328(a)'s general discharge provisions and required a showing of undue hardship before a debtor could obtain a discharge of student loan debt.

In Doane's case, however, the form discharge order entered by the bankruptcy court contained language purporting to discharge Doane's student loan debt contrary to the law in effect on September 10, 1999. Specifically, the discharge order stated:

> 1. Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from *all* debts provided for by the plan or disallowed under 11 U.S.C. § 502 except any debt:
>
> . . . .
>
> (c) For a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) *in any case in which discharge is granted prior to October 1, 1996;*

(Emphasis added). The italicized language is what the parties and the courts below have referred to as the "sunset provision" or "sunset language." The sunset language arose from the 1990 amendments to the Bankruptcy Code, which made student loan debt nondischargeable in Chapter 13 bankruptcies unless a debtor separately filed an adversary proceeding initiated by service of a summons and complaint upon

the student loan creditor.[3] Such an adversary proceeding requires a trial at which the debtor bears the burden of proving undue hardship pursuant to 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 7001(6).

The sunset provision stated that the exception of student loan debt from a Chapter 13 discharge would be effective "in all cases in which discharge was granted prior to October 1, 1996." This sunset provision was incorporated into the form discharge order that was adopted nationwide after the 1990 amendments.

On July 23, 1992, Congress repealed the sunset provision, thereby continuing the requirement that student loan debt could only be discharged under the provisions stated in § 523(a)(8). *See* 11 U.S.C. § 1328, Historical and Statutory Notes (citing Pub. L. No. 102-325). Unfortunately, after the sunset provision was repealed in 1992, the bankruptcy courts in the Western District of Virginia continued to use the form discharge order that contained the sunset language.

When Doane received her Chapter 13 discharge on September 10, 1999, the bankruptcy court entered the outdated, improper form discharge order containing the sunset language, which purported to discharge Doane's student loan debt even though she herself had not requested a discharge of her student loan debt,

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[3] Unlike Chapter 7 cases, prior to 1990, student loans were discharged under the Chapter 13 super discharge provision, regardless of time in repayment or undue hardship considerations. In 1990, however, Congress amended § 1328 to except student loan debt from the general Chapter 13 discharge provisions. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990).

either improperly through her plan or by filing an adversary proceeding. Neither the parties nor the bankruptcy court itself dispute that the form discharge order contravened the law in effect on its date of entry.

The bankruptcy clerk mailed the form discharge order to ECMC at the address provided in the assignment of claim but not to the attention of a person authorized to accept service of process pursuant to Fed. R. Bankr. P. 7004(b)(3). No one appealed that order within the ten days provided by Fed. R. Bankr. P. 8002(a). After Doane's discharge, ECMC initiated collection procedures as it was required to do in its capacity as a guaranty agency under the Federal Family Education Loan Program.

Doane reopened her bankruptcy case and filed a Motion for Contempt on May 3, 2001, asserting claims involving non-Title 11 law and alleging that ECMC had attempted to collect discharged student loan debt. In addition to responding timely to Doane's motion, ECMC moved for relief from the outdated, improper discharge order under Fed. R. Civ. P. 60(a) and 60(b)(4), on the grounds that the order contained a clerical mistake and/or that the order was void because it violated ECMC's due process rights.

The bankruptcy court wholly denied ECMC's motion on May 23, 2002. Interestingly, the bankruptcy court fully acknowledged that the outdated, improper discharge order did not reflect the law in effect on the date it was entered. Instead of correcting the error, however, the bankruptcy court decided that its error constituted neither a clerical mistake nor a denial of due process to ECMC.

After its request for leave to appeal the May 23, 2002, Order was denied as interlocutory, ECMC filed a Rule 60(b)(4) and Rule 60(b)(6) motion in Doane's main bankruptcy case (not in the adversary proceeding), reasserting its initial grounds for relief and also arguing that the bankruptcy court lacked subject matter jurisdiction to enter an order not in compliance with the Bankruptcy Code. By order dated December 20, 2002, the bankruptcy court again denied ECMC's Rule 60 motions filed in the main case, incorporated its May 23, 2002, Order and Decision, and held that the form discharge order issue was ripe for appeal.

On appeal, U.S. District Court Chief Judge Samuel G. Wilson reversed the bankruptcy court, holding that neither Doane nor the bankruptcy court had provided the requisite notice to ECMC that its substantive rights were at issue or the opportunity to be heard *before* the improper discharge order was entered. Relying on Fourth Circuit law, the district court stated that "absent specific notice [pursuant to Fed. R. Bankr. P. 7004(b)(3)] of a debtor's intent to discharge a student loan debt, including the requisite service of process in an adversary proceeding, a court may not discharge student loan debt without violating due process." (citing *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002)). In addition to defective notice, the district court also noted that entry of the improper discharge order violated due process by denying ECMC an opportunity to be heard *before* the bankruptcy court discharged Doane's student loan debt. Specifically, the district court held that,

> ECMC failed to receive any notice of the purported discharge until after the discharge order, when it rights were effectively decided. Although ECMC could have appealed the discharge order within ten days of entry, the lack of appropriate notice under the Bankruptcy Rules and Code provided no meaningful notice or opportunity to be heard prior to entry of the order. In fact, ECMC could have challenged entry of the discharge order only if it was able to anticipate the error before the bankruptcy court even entered it. Such a deficiency falls short of the notice standard applied in *Banks*, and violates due process.

As a result, the district court held that the form discharge order was entered in a manner inconsistent with due process and was, therefore, void pursuant to Rule 60(b)(4).

Doane appealed to the Fourth Circuit Court of Appeals. Four days before oral argument, the court removed the case from the oral argument calendar and decided the case on the briefs. On June 28, 2004, the Fourth Circuit issued a *per curiam* unpublished decision affirming the district court. *See* 2004 WL 1433436 (4th Cir. June 28, 2004). The Fourth Circuit subsequently denied Doane's petition for rehearing en banc, and Doane has now timely petitioned for this Court's review.

REASONS FOR DENYING CERTIORARI

I. The Fourth Circuit's decision stands solidly on decades of Supreme Court precedent regarding a party's constitutional right to due process.

More than five decades ago, this Court held that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Mullane*, this Court defined the notice necessary to meet the minimal standards of due process as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Additionally, *Mullane* requires that the opportunity for a hearing precede the deprivation of rights because right to be heard has "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest." *Id.*

On May 17, 2004, in *Tenn. Student Assistance Corp. v. Hood*, this Court prescribed the precise process due to a student loan creditor in a student loan discharge case. 124 S. Ct. 1905 (2004). Specifically, this Court stated that

> Section 523(a)(8) is "self-executing. *Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.*
>
> . . . .

> Because student loan debt is not automatically dischargeable, . . . the Federal Rules of Bankruptcy Procedure provide creditor greater procedural protection. See Fed. Rules Bkrtcy. Proc. 7001(6), 7003, and 7004. *The current Bankruptcy Rules require the debtor to file an "adversary proceeding" . . . to discharge his student loan debt. . . . [A]s prescribed by the Rules, an "adversary proceeding" requires the service of a summons and a complaint.* Rules 7001(6), 7003, and 7004.

Hood, 124 S. Ct. at 1912-13 (citations omitted) (emphasis added). *Hood* thus specifies which bankruptcy procedural rules, that is, what level of notice and what type of hearing opportunity, are required to effect due process under *Mullane*.

The Fourth Circuit's *Doane* decision comports with *Hood*'s recitation of the procedural process due in student loan discharge cases. *See Educ. Credit Mgmt. Corp. v. Doane (In re Doane)*, 2004 WL 1433436, at *1 (4th Cir. June 28, 2004), *aff'g Educ. Credit Mgmt. Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003). The Fourth Circuit held that the improper discharge order was void because it was entered in violation of ECMC's due process rights. 2004 WL1433436, at *2. The *Doane* court emphasized that "'due process entitle[s] the creditor to receive notice . . . as provided by the Bankruptcy Rules.'" *Id.* (citing *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002)).

Likewise, in *Banks*, the Fourth Circuit referenced the same bankruptcy rules cited by the Supreme Court in *Hood*. Specifically, *Banks* held that, to discharge a student loan, a debtor must initiate an adversary proceeding, complete with a summons and complaint, pursuant to Fed. R. Bankr. P. 7001(6) and 7003. *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 300-01 (4th Cir. 2002). And, most importantly, the debtor must serve the summons and complaint pursuant to Fed. R. Bankr. P. 7004, which, in the case of a corporation such as Great Lakes or ECMC, must be upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process." *Id.* at 301.

The Fourth Circuit explained the rationale behind the "heightened notice" requirement:

> Fed. R. Bankr. P. 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. "[T]here are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically." Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Fed. R. Bankr. P. 7003, 7004. Mailing the proposed plans, the hearing notice, and the confirmation

> order satisfies the "notice" requirement under Rule 2002, but not the service and summons requirements of Rule 7004.

Banks, 299 F.3d at 301 (internal citation omitted); *see also In re Boykin*, 246 B.R. 825, 828-29 (Bankr. E.D. Va. 2000) (distinguishing general notice provision applicable in bankruptcy proceedings from service of process requirements in an adversary proceeding).

II. There is no split among the circuit courts of appeal.

Every appellate court that has reviewed the validity of the form discharge orders on due process grounds has granted relief to the student loan creditor.[4]

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[4] *See, e.g., Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) (holding that *Andersen* does not apply and the improper form discharge order cannot discharge the student loan debt); *Educ. Credit Mgmt. Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003), *aff'd* 2004 WL1433436, at *1 (4th Cir. June 28, 2004) (granting relief under Rule 60(b)(4) because improper form discharge order violates ECMC's due process rights); *In re Hanson*, 308 B.R. 903 (W.D. Wis. 2004) (holding that the improper discharge orders are void) (*appealed by debtor and argued to 7th Circuit on November 12, 2004*); *Pearson v. United States Dep't of Educ. (In re Pearson)*, 279 B.R. 612, 616-17 (Bankr. M.D. Ga. 2002) (following remand instructions from district court and holding that the improper discharge order is not binding on ECMC because the order is void under Fed. R. Civ. P. 60(b)(4)); *but see Peterson v. Student Loan Mktg. Assoc. (In re Peterson)*, 251 B.R. 441 (Table), 1999 WL 977069, at **4 & n.6 (B.A.P. 10th Cir. Oct. 25, 1999) (unpublished) (holding that form discharge order omitting reference to § 523(a)(8) is res judicata against student loan creditor but noting that creditor had not moved for Fed. R. Civ. P. 60 relief in

Specifically, the courts have held that (1) a discharge order entered outside a court's authority is void on jurisdictional grounds and (2) student loans may only be discharged through an adversary proceeding, which requires specific notice, including the requisite service of process, and a meaningful opportunity to be heard *before* the discharge is granted. Anything less violates basic constitutional principles of due process.

In an attempt to construct a circuit split, Doane points to two cases involving improper plan language that, while analogous to the instant issue, were decided on different analytical grounds and, therefore, cannot form the basis for a circuit split.[5] *See Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999); *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999).

In her petition, Doane claims that there is a circuit split because this case is "in direct conflict" with *Andersen* and *Pardee*. (Pet. Br. at 11). This statement is disingenuous at best but, more so, reflects Doane's failure to update her research before filing her petition. Indeed, a March 26, 2004, decision from the Ninth Circuit Bankruptcy Appellate Panel has cast serious doubt on *Pardee*, and a September 7, 2004, Tenth Circuit decision has effectively overruled *Andersen* with respect to the improper form discharge order issue. *See Poland v. Educ. Credit Mgmt. Corp. (In re*

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bankruptcy court), *effectively overruled by Poland*, 382 F.3d at 1189).

[5] Doane appears to recognize that the issues are different. *See* Pet. Brief, at 24 (stating that "[t]he erroneous form discharge issue is different from the discharge by declaration problem").

Poland), 382 F.3d 1185, 1189 (10th Cir. 2004) (reversing district court and holding that *Andersen* rule does not apply to improper form discharge orders); *Educ. Credit Mgmt. Corp. v. Repp (In re Repp)*, 307 B.R. 144, 149 (B.A.P. 9th Cir. 2004) (stating that *Pardee* did not decide issue plan language issue on due process grounds).

Andersen and *Pardee* involved the practice of debtors inserting language in their Chapter 13 plans that discharged their student loans, hoping that the student loan creditor would not see it and would fail to object to confirmation. Under 11 U.S.C. § 1327, creditors are bound by the terms of a confirmed plan. Although *Andersen* and *Pardee* both upheld the "discharge by declaration" on statutory res judicata grounds, *Andersen* requires that the plan contain specific discharge language referencing "undue hardship" or 11 U.S.C. § 523(a)(8) in order for the language to discharge the loans. *Pardee* allowed generic "the loans will be discharged" language to effectively discharge the loans. In either case, both the Ninth and Tenth Circuits admonished the practice, but both elevated the need for finality of orders over the illegal practice and held that confirmation orders were res judicata as to the student loan creditors' rights.

Petitioner's continued attempts to make *Pardee* and *Andersen* directly applicable to the instant issue by inserting the words "discharge order" into the legal discussion of *Pardee* and *Andersen* must be ignored. *See* Pet. Brief at 16-17. *Pardee* and *Andersen* involved the res judicata effect of 11 U.S.C. § 1327, which applies specifically and only to confirmation orders. Contrary to Petitioner's Brief, neither *Pardee* nor *Andersen* addressed the legal effect of the improper form

discharge orders, orders that do not fall into the statutory scope of § 1327.

In 2002, the Fourth Circuit Court of Appeals addressed the same plan language issue but analyzed it on different grounds. *See Banks*, 299 F.3d at 296. Specifically, the Fourth Circuit agreed that "a bankruptcy court confirmation order generally is afforded a preclusive effect" but held that "we cannot defer to such an order if it would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution." *Id.* at 302.[6] Citing this Court's decision in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), the Fourth Circuit held that "[w]here the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect. *See id.* Additionally, unlike *Pardee* and *Andersen*, the Fourth Circuit's *Banks* decision does apply to discharge orders as well as confirmation orders because due process, not statutory res judicata, forms the analytical basis of *Banks*. *See Banks*, 299 F.3d at 303 ("For lack of adequate notice, the confirmation and discharge orders discharging the interest are not entitled to preclusive effect.").

Since *Banks*, there has been a seismic shift in the courts' legal analysis of plan language cases, with all but one court following *Banks* and recognizing that

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[6] Contrary to Doane's Brief, the *Banks* court did not "acknowledge[] it was creating a split among the Circuits." *See* Pet. Brief, at 10.

neither *Andersen* nor *Pardee* considered whether an adversary proceeding was necessary to satisfy constitutional due process standards. *See, e.g., Repp*, 307 B.R. at 149 (due process question remains open in Ninth Circuit in spite of *Pardee); Banks*, 299 F.3d at 302 (distinguishing *Andersen*'s "need for finality trumps illegality" rule and holding that *Andersen* did not expressly address due process requirements in illegal plan language cases); *In re Ruehle*, 296 B.R. 146, 158 (Bankr. N.D. Ohio 2003) (stating that the *Andersen* court failed to "evaluate the due process concerns of a 'discharge by declaration' plan provision, which resulted in an incomplete analysis of the issues"), *aff'd* 307 B.R. 28 (B.A.P. 6th Cir. 2004) (*on appeal to 6th Cir.)*; *Educ. Credit Mgmt. Corp. v. Whelton (In re Whelton)*, 299 B.R. at 316 (noting that *Banks* decision relied on due process principles in contrast to *Andersen* and *Pardee*, which did not), *aff'd* 312 B.R. 508 (D. Vt. 2004) (*on appeal to the 2d Cir.)*; *In re Lemons*, 285 B.R. 327, 331 (Bankr. W.D. Okla. 2002) ("This court agrees with the numerous courts that characterize *Andersen* as a res judicata case, and further agrees with the *Banks* court that the *Andersen* court failed to address the due process requirement."); *but compare Poland*, 382 F.3d at 1189 n.2 (stating that "*Andersen* was wrongly decided and should be reconsidered") *with Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. Kan. 2004) (reviewing four consolidated cases and concluding that bankruptcy court is bound by *Andersen* rule and asserting that *Andersen* did decide the due process issue), *affirmed in part and reversed in part.*

On appeal from the *Boyer* bankruptcy court and in line with the Tenth Circuit's *Poland* decision, the Tenth Circuit Bankruptcy Appellate Panel affirmed one of the four cases consolidated in *Boyer* bankruptcy case. *See Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, ___ B.R. ___, 2004 WL 2896633 (B.A.P. 10th Cir. Dec. 14, 2004) (*Mersmann* contained the "magic language" required by *Andersen*). The BAP reversed and remanded the other three cases, holding that the bankruptcy plan language was not res judicata as to the dischargeability of the student loan debt because none of the plans referenced § 523(a)(8) or the words "undue hardship." *See Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, No. KS-04-015 (B.A.P. 10th Cir. Dec. 14, 2004) (unpublished); *Educ. Credit Mgmt. Corp. v. Seiwert (In re Seiwert)*, No. KS-04-016 (B.A.P. 10th Cir. Dec. 14, 2004) (unpublished); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, ___ B.R. ___, 2004 WL 2896631 (B.A.P. 10th Cir. Dec. 14, 2004). For copies of unpublished cases, see Resp. Appendix, at 1a-18a.

The Ninth Circuit BAP's *Repp* decision is especially significant because it highlights the steady erosion of the *Pardee* rule in the Ninth Circuit. Further, the Tenth Circuit's *Poland* decision effectively overruled *Andersen* regarding its applicability to the improper form discharge order, by expressly holding that *Andersen* did not apply to the discharge order because the discharge order contained no language finding that repayment of the student loan debt would constitute an undue hardship. *Poland*, F.3d at 1189.

Likewise, the ever-burgeoning body of case law, cited *supra*, reflects a judicial recognition that the *Andersen/Pardee* courts focused on the res judicata effect of confirmation under 11 U.S.C. § 1327, not on constitutional requirements of due process. This distinction is critical because a judicially created or statutorily created doctrine like res judicata cannot trump a party's constitutional rights: "[i]t is, of course, a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict." *United States v. Coppa (In re United States)*, 267 F.3d 145-46 (2d Cir. 2001); *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich., 2001) ("Constitutional requirements will trump a conflicting statute, just as a statute will trump a conflicting rule.").

In the instant case, the Fourth Circuit, in line with its earlier *Banks* decision,[7] held that entry of the improper form discharge order violated ECMC's due process rights because its entry violated the minimum due process standards necessary in student loan discharge cases. Under *Mullane*, the Fourth Circuit held that

> due process entitles a student loan creditor to specific notice of the Debtor's intent to discharge any portion of the debt. Section 523(a)(8) explicitly

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[7] Contrary to Doane's Brief, the improper form discharge order was void, not because "it was within the controlling precedent of *Banks*" but because it violated ECMC's constitutional right to due process. *See* Pet. Brief, at 10.

> precludes the discharge of the Debtor's student loan debts absent a showing of undue hardship.... The Bankruptcy Code and Rules require Debtor to bring an adversary proceeding to establish undue hardship. Fed. R. Bankr. P. 7001(6).... Initiation of an adversary proceeding requires a summons and service of process under Rule 7004(b). Fed. R. Bankr. P. 7003, 7004. Banks failed to initiate an adversary proceeding to establish undue hardship. As a result, ECMC did not receive requisite notice of Banks' intent to discharge post-petition interest on his student loan debts. *For lack of adequate notice, the confirmation and discharge orders discharging the interest are not entitled to preclusive effect.*

Banks, 299 F.3d at 302-03. (emphasis added) (citations omitted); *see also Hood*, 124 S. Ct. at 1913. In *Hood*, this Court specifically referenced Fed. R. Bankr. P. 7001(6), 7003, and 7004, which require the debtor to initiate an adversary proceeding, file a summons and a complaint, and execute service of process on a specifically designated person under Fed. R. Bankr. P. 7004. *Id.*

In addition, the due process violation here went one step further than in the plan language cases: not only was ECMC denied specific notice before the improper discharge order was entered but it was also denied *any* opportunity for a hearing *before* the discharge order was entered. *Doane*, 302 B.R. at 182;

see also Mullane, 339 U.S. at 313 (opportunity to be heard must be appropriate to the nature of the case and must precede the deprivation of property at issue); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("This Court has traditionally insisted that, whatever its form, opportunity for [a] hearing must be provided before the deprivation at issue takes effect.").

Even if the analysis in the plan language cases were viewed as controlling, serious doubt remains as to the vitality of *Pardee* and *Andersen* in light of *Repp* and *Poland*, and any petitioner would have difficulty successfully arguing that there is a valid split in the circuits on plan language case. Without a doubt, however, nothing Doane provides in her Petition demonstrates a circuit split regarding the improper form discharge cases.

III. There is no important federal question inherent in Doane's request.

Doane's attempt to aggrandize this issue into an "issue of federal law with significant practical consequences" requiring this Court's review fails for four equally important reasons: First, Doane admits that she is not entitled to a discharge but is simply seeking to capitalize on the fact that she received a serendipitous "discharge because the court used the erroneous form discharge order." *See* Pet. Brief, at 12 n.4. This case is nothing more than a debtor hoping to capture a windfall. Further Doane's admission that she does not qualify for a discharge under 11 U.S.C. § 523(a)(8) highlights the injustice that would result if any court granted the relief that Doane requests. Moreover, the fact that Doane had "clean hands" unlike

the debtors in the plan language cases is irrelevant. In the same vein, ECMC did absolutely nothing wrong and should not suffer the consequences of the court's error. Due process is not a blame-based inquiry.

Second, it is unclear why Doane attempts to place such emphasis on the memoranda that issued from the Administrative Office of U.S. Courts (AO) following the repeal of the sunset language. None of the information regarding the AO memoranda was in the record, was considered by any of the courts below, or is even in Doane's Appendix to her Petition. But even the recitation in her brief summarizing the information contained in those memoranda clearly shows that the mistake in using the outdated orders falls squarely on the shoulders of the bankruptcy courts. *See* Pet. Brief, at 22 (noting that in December 1994, the AO issued a revised form discharge order that removed the "October 1, 1996, language"). Thus, as of December 1994, almost two years before the use of the form discharge orders containing the October 1, 1996, language would become problematic, all bankruptcy courts were on notice that the form discharge order had been revised.

Regardless of blame, orders that are entered in a manner inconsistent with due process are void under Fed. R. Civ. P. 60(b)(4). A void judgment is

> [o]ne which from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of

> confirmation, ratification, or enforcement in any manner or to any degree.

Black's Law Dictionary 1574 (6th ed. 1990). If a judgment is void because it violates due process, a party may move for Rule 60 relief "without appealing therefrom." *See Winhoven v. United States*, 201 F.2d 174, 175 (9th Cir. 1952); *see also Central States, Southeast & Southwest Areas Pension Fund v. Wintz Props.*, 155 F.3d 868, 875 (7th Cir. 1998) ("[V]oid order has no bite.").

Third, there is no disparate treatment of this issue across jurisdictions and there is no uncertainty. As noted above, every court that has decided this issue has held that the improper form discharge order is not valid—either on due process grounds or on other grounds such as those relied on by the Tenth Circuit in *Poland*.

Fourth, case law reflects that courts across the United States, from bankruptcy courts on up, are applying this Court's constitutional holdings uniformly. *See* Note 4, *supra*; *see also In re Tyler*, 285 B.R. 635 (Bankr. W.D. Tex. 2002) (granting ECMC relief under Fed. R. Civ. P. 60(b)(4)); *In re Amos*, 283 B.R. 864 (Bankr. W.D. Ky. 2002) (relying on due process grounds to hold that improper form discharge order was "erroneous as a matter of law). In this instance, it is only Doane who is asking to be treated differently.

CONCLUSION

On the whole of the record, Doane's Petition does not even approach the threshold necessary to invoke this Court's discretionary review. Moreover, Doane admits that she never sought to discharge her student loan debt through bankruptcy but seeks only to capitalize on an error by the court, irrespective of the denial of due process to ECMC. Further, Doane's attempt to construct a circuit split fails because of her miscitation of the issues and the law in the relevant circuits. The reality is that courts have consistently granted relief from the improper form discharge order, thereby ratifying the fundamental precept that all parties, even student loan creditors, are entitled to notice and an opportunity for a hearing before their substantive rights can be affected. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 14, 2004
Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

BAP No. KS-04-015
Bankr. No. 96-42993-13
Adv. No. 02-7141
Chapter 13

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE DEAN ALAN BOYER
and KARLA JOY BOYER,
Debtors.

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,
Plaintiff – Appellant,

v.

DEAN ALAN BOYER and KARLA JOY BOYER,
Defendants – Appellees.

Appeal from the United States Bankruptcy
Court for the District of Kansas

Filed December 14, 2004

ORDER AND JUDGMENT[1]

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtors' student loan debt to be discharged pursuant to a provision in their confirmed Chapter 13 Plan.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.[3] For the reasons stated below, the bankruptcy court's Judgment is REVERSED and the matter is REMANDED.

I. Background

The debtors filed a Chapter 13 petition in 1996. They scheduled ECMC's predecessor in interest (who will be referred to as "ECMC") as a creditor holding a general unsecured claim for unpaid student loans.

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[2] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

The Chapter 13 Plan proposed by the debtors contained the following relevant provisions:

THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND LEGAL RELATIONSHIPS PREVIOUSLY EXISTING. PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL ADVICE IF THEY DO NOT AGREE OR DO NOT UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge hereunder.

If the funds so paid do not repay the remaining unpaid original principal amount of any such debts, then the remaining unpaid original principal will be repaid by the debtor over a period of ten years after discharge at the then current interest rate for student loans.[4]

Accordingly, through this provision, the debtors proposed to discharge prepetition interest on their student loans, and any interest or penalties that accrued on that debt during their Chapter 13 case

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[4] Chapter 13 Plan at 2, Appellant's Appendix at 54

(collectively, the "Interest"). Despite the debtors' proposal to discharge the Interest through the confirmation of their Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),[5] ECMC did not object to confirmation of this Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtors' Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

In July, 1997, ECMC filed a proof claim in the debtors' case, asserting a general unsecured claim in the total amount of $33,724.90. Of this amount, $26,694.09 was claimed as principal (Principal Debt). The debtors objected to ECMC's proof of claim, arguing that it was not supported by proper documentation. ECMC amended its proof of claim, reducing its claim for Interest, but it never filed a pleading responding to the debtors' claim objection. Thus, being unopposed, the bankruptcy court entered an Order sustaining the debtors' claim objection (Claim Order). Although the claim objection only requested that ECMC's proof of claim be disallowed, the Claim Order prepared by the debtors' counsel states that the entire student loan debt reflected in the proof of claim was discharged. This Claim Order, therefore, is broader than the Confirmation Order in that it purports to discharge both the student loan Principal Debt and Interest.

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[5] All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

The debtors completed all payments under their confirmed Plan. Because ECMC's claim was disallowed by the Claim Order, it received no payments through the debtors' confirmed Plan.

In May, 2001, the bankruptcy court entered a "Discharge Order," granting the debtors a discharge pursuant to § 1328(a). The Discharge Order discharged the debtors' student loan debt in its entirety.[6] This form Order is not in accord with the version of § 523(a)(8) applicable in the debtors' case requiring their entire student loan debt to be excepted from discharge, and it also contradicts the Confirmation Order, which only discharged the debtors' student loan Interest.

Subsequently, ECMC commenced an adversary proceeding against the debtors, seeking a determination as to the dischargeability of the debtors' student loan debt. It alleged that the debt was not discharged by the Claim Order, and it requested that the Claim Order be amended pursuant to Federal Rule

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[6] The Discharge Order states:

1. Pursuant to 11 U.S.C. Section 1328(a) the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. Section 502, except any debt:

. . . .

(c) for a student loan . . . as specified in 11 U.S.C. Section 523(a)(8) in any case in which discharge is granted prior to October 1, 1996[.]

Discharge Order at 1, *quoted in Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42, 55 (Bankr. D. Kan. 2004). As discussed by the bankruptcy court, this language arose from a prior version of § 523(a)(8) and was included in the form order generated by the clerk of court by mistake. *Id.*

of Civil Procedure 60(b)(4) or (b)(6).[7] The debtors, in turn, asserted that the subsequent Discharge Order discharged the student loans in their entirety. ECMC then filed a motion to amend the Claim Order and/or the Discharge Order and a Motion for Summary Judgment. In these papers, it argued that the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. ECMC also alleged that the Interest was not discharged by the confirmed Plan because the debtors did not obtain a judgment under § 523(a)(8). The debtors opposed ECMC's Motions.

The bankruptcy court entered Judgement in favor of ECMC in part, and in favor of the debtors in part. It held that the student loan Principal Debt, plus post-discharge interest, was not discharged, but that the Interest was discharged. The bankruptcy court's Judgment is supported by separate findings of fact and conclusions of law, set forth in a Memorandum and Order.[8]

In its Memorandum and Order, the bankruptcy court held that the Principal Debt was excepted from discharge under § 523(a)(8) because the debtors had not

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[7] Federal Rule of Civil Procedure 60(b) is made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024.

[8] *Boyer*, 305 B.R. at 42. This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtors' case, as well the Judgments entered in three other Chapter 13 cases involving similar facts and issues. *In re Seiwert*, Bankr. No. 96-43032-13 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*, Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the "Related Debtor Cases"].

obtained a "hardship discharge" under that section, and the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. It refused to enforce the Claims Order and the Discharge Order to the extent that they stated that the Principal Debt was discharged. The Interest, however, was excepted from discharge pursuant to the terms of the debtors' confirmed Plan, even though they did not obtain a judgment against ECMC pursuant to § 523(a)(8). The bankruptcy court held that under *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,[9] ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtors completed their Plan payments. It did not address the discharge of the Interest pursuant to the Claim Order and the Discharge Order because the Confirmation Order controlled, and its discharge of the Interest did not conflict with those Orders, both of which discharged the student loan debt.

ECMC appealed the bankruptcy court's Judgment.[10] The debtors did not appeal the portions of the

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[9] 179 F.3d 1253 (10th Cir. 1999).

[10] ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court's Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *In re Seiwert*, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, __ B.R. __, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court's Judgment. __ B.R. __, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a "finding of undue

bankruptcy court's Judgment adverse to them.[11] The only issue before this Court is whether the bankruptcy court erred in discharging the student loan Interest.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,[12] the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged under the debtors' confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.[13] The debtors' confirmed Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest. The debtors can only obtain a discharge of their student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of that debt will impose an "undue hardship" on them and their dependents.[14]

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hardship" and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. *See Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

[11] As such we need not, and cannot, address the propriety of the bankruptcy court's decision refusing to enforce the provisions of the Claim Order and the Discharge Order as they relate to the Principal Debt.

[12] __ B.R. __, BAP No. KS-04-017, Slip Op. at 5-8; *accord Seiwert*, BAP No. KS-04-016, Slip. Op. at 6.

[13] 382 F.3d 1185 (10th Cir. 2004).

[14] 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and

While the student loan Interest was not discharged by the debtors' confirmed Plan as a matter of law under *Poland*, we note that the Claim Order and the Discharge Order state that the debtors' entire student loan debt, including the Interest, is discharged. Although ECMC challenged these discharge provisions below, requesting in its Complaint and in subsequent motions that both Orders be altered or amended to except the Interest from discharge, the bankruptcy court did not rule on ECMC's request for judgment or motions because it had concluded that the Interest was discharged pursuant to the confirmed Plan. We therefore remand this matter to the bankruptcy court to address ECMC's challenge of the discharge of Interest in the Claim Order and the Discharge Order.

III. Conclusion

The bankruptcy court's Judgment is REVERSED, and the case is REMANDED to the bankruptcy court for further proceedings consistent with this Order and Judgment.

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debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, __ B.R. __, BAP No. KS-04-018, Slip. Op. at 5-6 (same); *see generally Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).

Filed December 14, 2004
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 14, 2004
Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

BAP No. KS-04-016
Bankr. No. 96-43032-13
Chapter 13

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE CONNIE ANN SEIWERT,
Debtor.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
Appellant,

v.

CONNIE ANN SEIWERT,
Appellee.

Appeal from the United States Bankruptcy Court for the District of Kansas

ORDER AND JUDGMENT[1] *

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtor's student loan debt to be discharged pursuant to a provision in her confirmed Chapter 13 Plan.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.[3] For the reasons stated below, the portion of the bankruptcy court's Judgment declaring the student loan debt to be discharged is REVERSED.

I. Background

The debtor filed a Chapter 13 petition in 1996. She scheduled ECMC's predecessor in interest (who will be referred to as "ECMC") as a creditor holding a general unsecured claim for unpaid student loans in the total amount of $22,000.

The Chapter 13 plan proposed by the debtor stated, in relevant part, that:

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[2] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

SPECIAL CLASS CREDITORS (Designate total for class and % to pay) Student Loan Creditors _____ $_22,000_____100%__

. . . .

THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND LEGAL RELATIONSHIPS PREVIOUSLY EXISTING. PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL ADVICE IF THEY DO NOT AGREE OR DO NOT UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge[] hereunder.[4]

Accordingly, through this provision, the debtor proposed to discharge prepetition interest on her student loans, and any interest or penalties that accrued on that debt during her Chapter 13 case (collectively, "Interest").

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[4] Chapter 13 Plan at 2, Appellant's Appendix at 198.

While confirmation of this Plan was pending, ECMC filed a proof claim in the debtor's case, asserting a claim with a principal balance of $26,259.39, and prepetition interest of almost $3,000. The Chapter 13 trustee objected to ECMC's proof of claim, arguing that "PER PLAN ONLY ORIGINAL PRINCIPAL AMOUNT TO BE PAID" (Claim Objection).[5] ECMC did not respond to the Claim Objection.

While the Claim Objection was pending, a hearing on the confirmation of the debtor's Plan was held. Despite the debtor's proposal to discharge the student loan Interest through the confirmation of her Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),[6] ECMC did not object to confirmation of the Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtor's proposed Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

After the Confirmation Order was entered, the bankruptcy court entered an Order sustaining the unopposed Claim Objection (Claim Order). The Claim Order states that ECMC's claim is allowed as a "SPCL CLASS-UNSECURED claim in the amount of

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[5] Claim Objection at 1, Appellant's Appendix at 209.

[6] All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

$22,000," with an unsecured claim in the amount of $7,028.76.[7] ECMC did not appeal the Claim Order.

Several years later, the debtor completed payments under her confirmed Plan, including payments to ECMC totaling $22,000. As a result, in May, 2002, the bankruptcy court entered a "Discharge Order," granting the debtor a discharge pursuant to § 1328(a). Contrary to her confirmed Plan, the Discharge Order excepts the debtor's entire student loan debt from discharge. In July, 2002, a Final Decree was entered, and the debtor's Chapter 13 case was closed.

Almost one year after her case was closed, the debtor was notified that ECMC would offset a government payment to which she was entitled against her unpaid student loan debt. The debtor allegedly owed approximately $4,000.00 in principal (Principal Debt),[8] plus the Interest. In response, the debtor filed an "Application for Citation in Contempt," alleging that ECMC had violated the discharge injunction by attempting to collect the discharged student loan debt (Contempt Motion). The bankruptcy court reopened the debtor's Chapter 13 case and issued an Order to Show Cause (OSC), requiring ECMC to appear.

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[7] Claim Order at 1, Appellant's Appendix at 210.

[8] The debtor had paid ECMC $22,000 through her Plan, but ECMC asserted in its proof of claim that the principal debt was over $26,000. While ECMC's claim for principal in excess of $22,000 was disallowed in the debtor's Chapter 13 case by the Claim Order, the nondischargeable debt in excess of $22,000 survived the Chapter 13 case.

ECMC responded to the debtor's Contempt Motion and the OSC, alleging that the Discharge Order excepted the entire student loan debt from discharge. It maintained that the conflicting Confirmation Order, purporting to discharge otherwise nondischargeable Interest on the debtor's student loan debt, was void because the debtor had not commenced an adversary proceeding against it to obtain a determination of "undue hardship" under § 523(a)(8). It also argued that, even if the Confirmation Order served to discharge student loan debt, the discharge extended only to the Interest, not the Principal Debt.

The bankruptcy court entered a Judgment in favor of ECMC in part, and in favor of the debtor in part. It denied the debtor's Contempt Motion because the Principal Debt had not been discharged under the terms of the debtor's confirmed Plan and, therefore, the debtor was required to pay ECMC that Debt, plus post-discharge interest. However, ECMC was barred from collecting the Interest because it had been discharged pursuant to the terms of her confirmed Plan.

The bankruptcy court's Judgment is supported by separate findings of fact and conclusions of law, set forth in a Memorandum and Order.[9] The bankruptcy

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[9] *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. D. Kan. 2004). This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtor's case, captioned above, as well the Judgments entered in three other Chapter 13 cases involving the similar facts and issues. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, Bankr. No. 96-42993-13, Adv. No. 02-7141 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*,

court relied on *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,[10] in concluding that the student loan Interest was discharged, even though a § 523(a)(8) proceeding had not been commenced against ECMC. Specifically, it held that ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtor completed her Plan payments. It also stated that the contrary Discharge Order did not compel a different result, and denied "ECMC's request to enforce" the Discharge Order.[11]

ECMC timely appealed the bankruptcy court's Judgment, asserting that it erred in discharging the student loan Interest.[12] The debtor did not cross appeal

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Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the "Related Debtor Cases"].

[10] 179 F.3d 1253 (10th Cir. 1999).

[11] *Boyer*, 305 B.R. at 55.

[12] ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court's Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, __ B.R. __, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court's Judgment. __ B.R. __, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this debtor's case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a "finding of undue hardship" and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. *See Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

the portion of the Judgment denying her Contempt Motion and, therefore, this Court has no jurisdiction over that portion of the Judgment. Accordingly, the only issue before us is whether the bankruptcy court erred in discharging the student loan Interest pursuant to the terms of the debtor's confirmed Plan.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,[13] the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged pursuant to the debtor's confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.[14] The debtor's Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest.[15] There being no adjudication of undue hardship binding ECMC, the debtor can only obtain a discharge of her student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of

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[13] __ B.R. __, BAP No. KS-04-017, Slip Op. at 5-8; *accord Boyer*, BAP No. KS-04-015, Slip Op. at 6-8.

[14] 382 F.3d 1185 (10th Cir. 2004).

[15] The Discharge Order excepts the debtor's entire student loan debt from discharge. The bankruptcy court, holding that the Interest was discharged under the confirmed Plan, refused to enforce the Discharge Order as to the Interest. It did not, however, alter the Discharge Order. Accordingly, the Discharge Order now conforms to our holding that the Interest, as well as the Principal Debt, is excepted from discharge.

the debt will impose an "undue hardship" on her and her dependents.[16]

III. Conclusion

The portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged is REVERSED.

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[16] 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, __ B.R. __, BAP No. KS-04-018, Slip Op. at 5-6, (same); *see generally Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).

No. 04-728

Supreme Court, U.S.
FILED
JAN 13 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

KIMBERLY DOANE,
a/k/a KIMBERLY HARIG,

Petitioner,

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT AS TO WHY THE WRIT SHOULD BE GRANTED

The opening argument of the respondent's Brief in Opposition illustrates the split inherent in the cases which address what due process is required before a bankrupt debtor may obtain a discharge of student loans.

The respondent Educational Credit Management Corporation (ECMC) argues that this Court stated "the precise process due to a student loan creditor" in *Tennessee Student Assistance Corp. v. Hood*, when the Court wrote that the current Bankruptcy Rules "require the debtor file an 'adversary proceeding'." 541 U.S. 440, ___, 124 S.Ct. 1905, 1912-13, 158 L.Ed.2d 764, 777 (2004).

However, this Court specifically noted in *Hood* that an adversary proceeding is not a requirement of constitutional due process. The Court wrote:

> The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern. . . . We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be of dispositive weight.

541 U.S. ___, 124 S.Ct. at 1914, 158 L.Ed.2d at 779.

The Fourth Circuit's decision below is not consistent with this Court's decision in *Hood* because the Fourth Circuit held that "due process entitles the creditor to receive notice . . . as provided by the Bankruptcy

Rules," *Educ. Credit Mgmt Corp. v. Doane (In re Doane)*, 2004 WL 1433436 at *1 (4th Cir. June 28, 2004), *aff'g Educ. Credit Mgmt Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003), even though this Court clearly stated in *Hood* that an adversary proceeding is not a constitutional requirement.

The issue posed by this case--whether an order which discharges a student loan is void on due process grounds when the debtor did not first file an adversary proceeding--continues to be unsettled.

A review of the recent cases cited by ECMC illustrates the disagreement among the lower courts on this issue.

The Fourth Circuit is the only Court of Appeals in the country which has ruled that an order discharging a student loan is void on due process grounds unless the debtor has first filed an adversary proceeding. *Banks v. Sallie Mae Servicing Corp.*, 299 F.3d 96 (4th Cir. 2002). The rule in the Ninth and Tenth Circuits, the two other Courts of Appeals that have addressed the issue, is the opposite. Contrary to ECMC's attempt to confuse the issue, the Tenth Circuit has not overruled *Anderson v. UNIPAC NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999), nor has the Ninth Circuit overruled *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916 (Bankr. 9th Cir. 1998), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). The rule in the Fourth Circuit continues to be that an order which discharges a student loan is void unless the debtor filed an adversary proceeding, and the rule in the Ninth and Tenth Circuits continues to be that

such orders are not void.[1]

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[1] The respondent's assertion that Ms. Doane is "attempt[ing] to create a circuit split" by pointing to the discharge-by-declaration cases is disingenous. Throughout this litigation, Ms. Doane has argued that the erroneous form discharge order situation is different from the discharge-by-declaration situation and should be analyzed differently because the erroneous form discharge problem arose out of a systemic error throughout the country. Ms. Doane argued below that ECMC knew of the error for years, but took no action to appeal the erroneous discharge orders, seek reconsideration of the orders, or attempt to have the Administrative Office of the U.S. Courts or local clerks to correct the erroneous order. The Bankruptcy Court agreed with this argument, as did other Courts around the country who were faced with the naked issue of the erroneous form discharge order. *See, e.g., Peterson v. Student Loan Marketing Ass'n*, 1999 Bankr. LEXIS 1317, 16 Colo. Bankr. Ct. Rep. 307 (10th Cir. B.A.P. 1999); *Poland v. ECMC*, 276 B.R. 660 (D. Kan. 2001), *rev'd at Poland v. ECMC (In re Poland)*, 382 F.3d 1185 (10th Cir. 2004); *ECMC v. Pearson*, 2000 Bankr. LEXIS 1972 (Bankr. M.D.Ga. 2000), *rev'd at ECMC v. Pearson*, 2002 U.S. Dist. LEXIS 815 (M.D.Ga. 2002). However, the district court here reversed, applying the Fourth Circuit's *Banks* decision, a discharge-by-declaration case, and the Fourth Circuit affirmed, stating that *Banks* controls Ms. Doane's case, even though it is not a discharge-by-declaration case. Ms. Doane addresses the split among the circuits on the discharge-by-declaration cases only because the Fourth Circuit has placed her case in the discharge-by-declaration category and there is a split among the circuits in that category.

The Ninth Circuit has not overruled *Pardee*, and there is a split within the lower courts in that circuit as to whether due process requires the filing of an adversary proceeding to discharge a student loan. In *Educ. Credit Mgmt Corp. v. Repp (In re Repp)*, 307 B.R. 144, 149 (Bankr. 9th Cir. 2004), the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court, which had followed *Pardee*, and held that due process did not require the debtor to file an adversary proceeding to obtain a discharge of a student loan. *Id.* at 147. The B.A.P. held that "[w]e agree with the Fourth Circuit to the extent that notice less than which results from compliance with Rule 7004's requirement for serving a complaint on a corporate defendant flunks due process." *Id.* at 146.

However, Bankruptcy Judge Ryan, one of the members of the three-judge panel dissented, stating that *Pardee* controlled, and that *Pardee* was decided correctly because:

> [T]he idea that a creditor with more than twenty-five days notice of a plan containing a provision that adversely affects it can ignore the proceeding, sit on its rights, and then raise a due process argument years later defies common sense.

Id. at 155.

Thus, the B.A.P. decision in *Repp* does not overrule, or even undermine, the Ninth Circuit's decision in *Pardee*. The bankruptcy court and one member of the B.A.P. panel followed *Pardee* and held that it was correctly decided. Even the panel majority noted that

Pardee "widened a split . . . by siding with the Tenth Circuit on the question of the effect of "illegal" chapter 13 plan provisions." *Id.* at 147 n.2. Most importantly, even though the B.A.P. decided *Repp* in a manner which is not consistent with *Pardee*, the Ninth Circuit itself has not overruled *Pardee*. Thus, even within the Ninth Circuit, *Pardee* continues to be good law and, at most, *Repp* merely demonstrates that a panel majority of the B.A.P. agrees with the Fourth Circuit's *Banks* decision and disagrees with the Ninth Circuit's *Pardee* ruling and the Tenth Circuit's *Anderson* decision.

The cases in the Tenth Circuit also indicate a clear and definite split with the Fourth Circuit. The Tenth Circuit's decision in *Poland v. Educ. Credit Mgmt Corp.*, 382 F.3d 1185 (10th Cir. 2004) did not overrule *Anderson*. In *Anderson*, the debtor had filed a plan which stated that "[c]onfirmation of debtor's plan shall constitute a finding" that the student loans imposed an "undue hardship on the debtor and the debtor's dependents." 179 F.3d at 1254. In *Poland*, the debtor filed a plan which stated that "she disputed the validity and amount of her student loan debt" and that if the student loan creditor failed to timely file a proof of claim "the claim shall be deemed discharged in its entirety upon completion of the plan." *Id.* at 1187.

In *Poland*, the Tenth Circuit wrote that "[t]he panel is of the view that *Anderson* was wrongly decided and should be reconsidered." 382 F.3d at 1189 n.2. However, the Court did not overrule *Anderson* and merely held that *Anderson* was not applicable because the plan in *Anderson* explicitly stated that the confirmation of the plan constituted a finding of hardship, while the plan in *Poland* did not contain any language which could

constitute a finding of hardship.

In *Poland*, the bankruptcy court and the district court held that the erroneous form discharge order which the debtor received was valid, regardless of the plan language. *Id.* at 1189. The Tenth Circuit reversed, holding that *Anderson* did not apply because the erroneous form discharge order did not constitute a finding of hardship. *Id.* at 1189.

The Tenth Circuit B.A.P. has applied *Poland* in four recent cases in a manner which illustrates that the Tenth Circuit rule, in contrast to the Fourth Circuit rule, is that a debtor is not required to bring an adversary proceeding to obtain the discharge of a student loan. In *Educ. Credit Mgmt Corp. v. Nelson (In re Nelson)*, 2004 WL 2896631 (Bankr. 10th Cir. 2004), *Educ. Credit Mgmt Corp. v. Boyer (In re Boyer)*, No. KS-04-015 (Bankr. 10th Cir. 2004)(unpublished), and *Educ. Credit Mgmt Corp. v. Seiwert (In re Seiwert)*, No. KS-04-016 (Bankr. 10th Cir. 2004), the Tenth Circuit B.A.P. reversed bankruptcy courts which applied *Anderson* and declared student loans discharged on the grounds that *Poland* required that there be some language in the Chapter 13 plan which could constitute a finding of "hardship." However, on the same day, the same panel of the B.A.P. affirmed the district court finding in *Educ. Credit Mgmt Corp. v. Mersmann*, 2004 WL 2896633 (Bankr. 10th Cir. 2004) that the student loan was discharged on the grounds that the language in the Chapter 13 plan stated that the confirmation of the plan stated that the confirmation constituted a finding of hardship, even though the debtor did not file an adversary proceeding. Thus, the 10th Circuit B.A.P. has applied *Poland* to mean that, contrary to the Fourth Circuit rule in *Banks*, a debtor can obtain a

discharge of her student loan without first filing an adversary proceeding, so long as the plan is drafted properly, and that due process does not require the filing of an adversary proceeding.

Thus, contrary to ECMC's strident assertion, the recent cases do not resolve the Circuit split. The split is as wide as ever. The Tenth Circuit was given an opportunity to overrule *Anderson* in *Poland*, but it did not do so, and the subsequent Tenth Circuit B.A.P. cases demonstrate that debtors in the Tenth Circuit are not required to first file an adversary proceeding to obtain a discharge of their student loans, so long as their plan is drafted properly. The Ninth Circuit B.A.P. has stated its disagreement with the Ninth Circuit's *Pardee* decision, but a minority of the B.A.P. and the lower courts in the Ninth Circuit have explained why they think *Pardee* was decided correctly, and the Ninth Circuit itself has not overruled *Pardee*.

Thus, Ms. Doane's case presents a square split among the Circuits. Since Ms. Doane lives in the Fourth Circuit, *Banks* controlled, and her erroneous form discharge order was declared to be void only because she did not first file an adversary proceeding to determine if the student loan debt was discharged. If Ms. Doane lived in the Ninth Circuit, her case would be controlled by *Pardee* and the discharge would have been enforced because ECMC failed to appeal or seek reconsideration of the confirmation order and the discharge order. If Ms. Doane lived in the Tenth Circuit, her erroneous form discharge order would not have been enforced because her plan did not state that plan confirmation constituted a finding of hardship, not because she did not file an adversary proceeding. Nevertheless, the rule in the

Tenth Circuit remains that, contrary to the Fourth Circuit rule in *Banks*, a debtor is not required to file an adversary proceeding to obtain discharge of a student loan but, under *Anderson* and *Poland*, may obtain a discharge if the debtor includes "hardship" language in the Chapter 13 plan.

The Constitution contemplates that bankruptcy law should be uniform. U.S. Const. art. II § 8 (Congress is authorized to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). The law on discharges-by-declaration and erroneous form discharge orders is not now uniform. At least tens of thousands of debtors, perhaps hundreds of thousands of debtors, around the country have received Chapter 13 discharge orders which, by their plain language, have discharged the debtors' student loans. Debtors who live in the Ninth and Tenth Circuits may obtain a discharge of their student loan debt without first filing an adversary proceeding, while debtors in the Fourth Circuit may not. This Court should address the disparity around the country.

This case squarely presents the issue of what process is due before a student loan may be discharged. Although there is a split of authority on the due process issue, debtors who have received valid court orders discharging their student loans are at least entitled to a final, nationwide, determination as whether, or why, a student loan creditor like ECMC was denied due process when it received notice of the Chapter 13 plan, failed to object to it prior to confirmation, received notice of the confirmation hearing and failed to appear, received the confirmation order but failed to appeal it or seek reconsideration of it, received the discharge order but

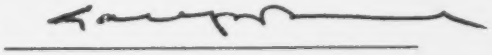
failed to appeal it or seek reconsideration of it, all at a time when it was litigating erroneous form discharge order issue all over the country in other cases. As Bankruptcy Judge Ryan wrote is his dissent to the Ninth Circuit B.A.P. decision in *Repp*, the premise that all of this notice does not meet the constitutional standard of due process, but that due process also requires the filing of an adversary proceeding, "defies common sense." This Court should grant certiorari to provide guidance as to how much due process is enough in this context.

CONCLUSION

FOR THE REASONS stated herein the petitioners pray that this Court will grant this petition and review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

KIMBERLY DOANE

By: 

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